Supreme Court, U.S.
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No. 07-292

In The

Supreme Court of the United States

FATIMA G. WELIVER,

Petitioner,

v.

BOARD OF APPEALS, DEPARTMENT OF LABOR, LICENSING AND REGULATION OF MARYLAND and U.S. SOCIAL SECURITY ADMINISTRATION,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Special Appeals Of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Board of Appeals, Department of Labor, Licensing and Regulation of Maryland ("DLLR") denied unemployment insurance benefits to Petitioner, discharged from employment from the U.S. Social Security Administration ("SSA"), on grounds that she engaged in gross misconduct within the meaning of *Md. Code, Labor and Employment Article*, § 8-1002. The unemployment insurance benefit program is found in § 8-101 et seq. Hearings on unemployment insurance benefit claims are provided by the DLLR Board of Appeals, with authority to appoint hearing examiners, pursuant to § 8-505 and § 8-506. Hearings are to be conducted in accordance with the *Md. Code, State Government Article, Administrative and Procedure Act*, § 10-101 et seq. Judicial review is conducted pursuant to § 8-512(d) and under the State APA as provided for contested claims. *See Spencer v. Md. State Board of Pharmacy*, 380 Md. 515, 527-529, 846 A.2d 341, 348-349 (2004) for judicial review pursuant to § 10-222(h) of the State APA. The questions presented in this case are:

1. Did the Board of Appeals fail to provide due process of law when the Board did not conduct a de novo hearing and continued the hearing of the hearing examiner to take additional testimony, where the hearing examiner engaged in due process deficiencies in conducting the initial hearing, and the Board thereafter rendered a decision based on the combined hearing record of the hearing examiner and Board of Appeals?

2. Did the Board of Appeals fail to provide due process of law a) when not properly considering the evidence, and determined credibility of witnesses based on

QUESTIONS PRESENTED – Continued

the transcript of their testimony presented before the hearing examiner, and b) when issuing a decision of findings of fact without setting forth an evaluation of the evidence presented, without resolving conflicts in the evidence, and without setting out an evidentiary basis to support its findings of fact?

3. Did the Maryland judiciary fail to provide due process of law when refraining from applying applicable established legal principles of due process that are clear in Maryland law and as enunciated by this Court?

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OPINIONS BELOW

1. The orders of the Court of Appeals of Maryland ("CA") denying Petitioner's petition therein for writ of certiorari (App. 44), and denying her motion for reconsideration (*id.* at 45) are both unreported.

2. The decision of the Court of Special Appeals of Maryland ("CSA") (*id.* at 1), and order denying Petitioner's motion for reconsideration (*id.* at 29) are both unreported.

3. The decision of the Circuit Court for Anne Arundel County, Maryland (*id.* at 30) affirming the decision of the DLLR Board of Appeals is unreported.

4. The decision of the DLLR Board of Appeals denying Petitioner's claim for unemployment insurance benefits is unreported. (*Id.* at 35)

JURISDICTION

The Court of Appeals of Maryland denied Petitioner's petition therein for writ of certiorari to the Court of Special Appeals of Maryland on March 16, 2007, and denied her motion for reconsideration on June 8, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause contained in Section 1 of the Fourteenth Amendment to the U. S. Constitution provides, in pertinent part, that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law * * * ." Section 8-506, *Md. Code, Labor and Employment Article*, provides that "[a] hearing examiner, special examiner, and the Board of Appeals shall conduct a hearing or appeal that ascertains the substantial rights of the

parties," and "shall consider evidence offered in accordance with § 10-213 of the State Government Article."

STATEMENT

This case raises questions of recognition of fundamental elements of due process of law in the conduct of agency administrative proceedings. "The hearing required by the Due Process Clause must be 'meaningful . . . ,'" and "appropriate to the nature of the case." *Bell v. Burson*, 402 U.S. 535, 542 (1971). Further, it is an "elementary requirement that the decision maker should state the reasons for his determination and indicate the evidence he relied on." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

Prior to the hearing proceeding before the DLLR Board of Appeals, Petitioner filed a motion for a de novo hearing with the hearing examiner based on denial of due process of law in the hearing proceeding before the hearing examiner: a) the hearing examiner permitted gross post hoc rationalization testimony (asserted bases for removal not contained in the documents removing Petitioner from her employment); and failed to control gratuitous post hoc rationalizations on cross-examination of employer SSA's witnesses and limit answers to the questions asked, and allowed non-responsive answers; b) the hearing examiner would not require employer SSA's counsel to submit documents as evidence concurrently with witness testimony presented about what they contain, and permitted all such documents to be introduced at the conclusion of the testimony; and c) on cross-examination of employer SSA's witnesses, the hearing examiner refused to admit into evidence a document relating to the direct testimony that was incorporated by reference into the removal documents, and refused to admit into evidence documents so to show a defect in the opponent's case in chief.

When ruling on Petitioner's motion for de novo hearing, the hearing examiner transferred the case to the jurisdiction of the Board of Appeals with a recommendation that it be referred to the Maryland Office of Administrative Hearings ("OAH") to conduct a de novo hearing.[1]

Rather than referring the case to OAH or conducting a de novo hearing itself, the Board of Appeals simply continued the hearing proceeding of the hearing examiner to take testimony of Petitioner and her witnesses, and incorporated the hearing examiner's record as its own. The Board rendered its decision denying Petitioner's claim for unemployment insurance benefits when ruling that "testimony of the employer's witnesses [and Petitioner's hostile witness] [as viewed in the hearing transcript] to be more credible than Petitioner's [in person] testimony." Its decision also sets forth findings of fact without evaluation of the evidence presented, without resolving conflicts in the evidence, and without presenting an evidentiary basis to support its findings of fact.

Review by this Court is warranted to further clarify the standards and procedural safeguards to afford due process of law in the conduct of agency administrative hearings.

A. Factual Background

1. This case arises out of removal of Petitioner Fatima Weliver from her employment with the Social Security Administration. Until June 4, 2004, Weliver, a native Brazilian naturalized U.S. citizen, with a baccalaureate degree in International Relations from Ohio State

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[1] Delegation of matters to OAH is not a mandatory function but is within the discretion of the State administrative agency. *Spencer v. Md. State Board of Pharmacy, supra,* 846 A.2d at 347.

University, who speaks four languages: English, Spanish, Portuguese, Italian, held the position of Claims Examiner with the Glen Burnie, Maryland SSA District Office where she was employed as a bilingual Claims Examiner. See CSA Joint Record Extract ("E."), at 369, 376. Weliver had been employed by SSA for over four years and had received acceptable performance ratings when removed from her employment. (E. 365)

During her tenure with the SSA, Weliver had claimed harassment and abuse by her office management: Linda Faulkner-Martin, Manager, and Donna Jones, Assistant Manager, of the Glen Burnie, Maryland SSA District Office. Following a grievance filed on her behalf by Weliver's union (Local 1923, American Federation of Government Employees) alleging harassment and abuse, SSA entered into an agreement on August 9, 2002 providing for placement of Weliver in an SSA union office outside of the Glen Burnie office. (E. 369) In April, 2003, however, Faulkner-Martin without cause cancelled Weliver's union placement and compelled her to return to the Glen Burnie office. This action, as Weliver contends, violated the settlement agreement and that upon her return to the Glen Burnie office she was again subject to harassment and abuse by Faulkner-Martin and Jones. *Ibid.*

2. On March 24, 2004, Assistant Manager Jones issued a letter proposing to remove Weliver from her job, citing two grounds: (a) failure to follow a management directive; and (b) conduct unbecoming a federal employee. (E. 185)

In this letter Jones faulted Weliver for telephoning a few other employees, in a training class, at their home after working hours. (*Id.* at 186) According to Jones, these calls "violated a management directive" forbidding Weliver to call "your classmates at home" after working hours. (*Id.* at 185) This directive, Jones contended, was issued after management received complaints by Weliver's classmates

about critical comments she had made "about management officials." *Ibid.*

Jones's letter also faulted Weliver for "conduct unbecoming a federal employee" – allegedly behaving in a manner that was "disrespectful and discourteous" as well as "disruptive." (*Id.* at 186) Weliver's supposedly unacceptable behavior, virtually all of which was in her direct interactions with Jones, included objecting to participating in a meeting about her workplace behavior with Jones without being allowed to have her lawy r present. (*Id.* at 187) Jones terminated the meeting after initially permitting Weliver to call her lawyer and thereafter making Weliver end the telephone call "because [Weliver] started discussing issues that were not relevant to our conversation." *Ibid.* This and other behavior on Weliver's part, Jones's letter claimed, "violated the letter, spirit, and intent of government wide and agency standards of conduct." (*Id.* at 187, 188) ("Without question, such behavior is non compliant and aberrant – overstepping recognized workplace norm [sic].")

On April 2, 2004, Jones rescinded the March 24, 2004 proposal to remove letter (E. 184), and sent Weliver a revised letter setting forth additional reasons for the proposed removal from her job. (E. 176) In addition to reiterating the earlier charges and allegations verbatim, the revised letter included new allegations to support Jones's claim that Weliver had engaged in "conduct unbecoming a federal employee." Specifically, Jones's revised letter stated that Rebecca Gartelman, an office cleaning maintenance worker, employed by an outside contractor rather than by SSA, had complained to District Office Manager Linda Faulkner-Martin of various assaults by Weliver on March 16, 2004 and assaults on March 29, 2004 and that Weliver had been "tormenting" her. (*Id.* at 178) Among other things, it is alleged, that Gartelman told agency management, Faulkner-Martin and Jones,

that Weliver had come up behind her while Gartelman was cleaning a commode and forced her head down into a toilet, causing the ends of Gartelman's hair to get wet from the toilet water, and all the while screaming at Gartelman: "You know that you are a dirty rat, don't you?" (*Id.* at 179) Jones's revised letter also cited as a further example of "conduct unbecoming a federal employee" Weliver's refusal, at a meeting on March 31, 2004, to discuss her workplace behavior with Jones (after Jones, once again, refused to allow Weliver to have her lawyer present for the meeting). *Ibid.*

3. After receiving the April 2, 2004 letter proposal to remove, Weliver through counsel, on April 29, 2004 submitted a written response to Jones's letter. (E. 168) Among other things, Weliver vigorously disputed the veracity of Rebecca Gartelman's charges and noted that because Weliver was undergoing certain treatments for cancer, she simply lacked the physical strength to push another person's head into a toilet bowl. (*Id.* at 169) Weliver also contended that the charge that she disobeyed a management directive not to phone her co-workers after work hours was "bogus" and any such directive was clearly beyond the agency's authority. (*Id.* at 170) Such authority extends only "at the worksite," and "[m]anagement may not discipline an employee who refuses to obey an order that is found to be unlawful or illegal." (SSA Managers Labor Relations Handbook. (E. 336)) In addition, Weliver claimed that agency management had violated the 2002 settlement agreement as well as her right to have her attorney present at meetings related to her job performance. (E. 168-169)

On May 26, 2004, Weliver's counsel sent a letter to Commissioner of Social Security Administration JoAnne B. Barnhart explaining that Weliver had "been [the] subject of orchestrated harassment and abuse by the Glen Burnie District Office, and now that [same] management

was seeking to remove her from the Federal Government" based on unfounded allegations and "false testimony." Counsel referred to his telephone interview with Gartelman on April 1, 2004. (E. at 226) Counsel requested that the Commissioner review, investigate, and resolve this matter, "instead of the Regional Office, Region III, which has oversight responsibility for the Glen Burnie District Office." (*Id.* at 227) Along with this letter, counsel enclosed Jones's April 2, 2004 proposal to remove and Weliver's April 29, 2004 response to Jones's allegations. (*Id.* at 226)

Six days after Weliver requested intervention by the Commissioner's office, Faulkner-Martin by letter of June 1, 2004, adopted Jones's April 2, 2004 proposal to remove letter in all respects, effective June 4, 2004 – "adopt[ing] and incorporat[ing] herein all of the reasons for removal articulated by Ms. Jones in her April 2, 2004 Proposal to Remove." (E. 170) Faulkner-Martin concluded that Weliver was a "divisive force in this office" and should be fired. (*Id.* at 171)

4. On June 3, 2004, Weliver's counsel sent another letter to SSA Commissioner Barnhart again requesting that the Commissioner resolve this matter and taking issue with the numerous statements made in Faulkner-Martin's June 1, 2004 termination letter. (E. 228)[2] Among other things, counsel again reported (set forth in an affidavit (E. 208)) that he had spoken with Rebecca Gartelman on April 1, 2004 (*id.* at 229), three days after the alleged incident involving the lavatory and one day before

[2] Attached to the June 3 letter from Weliver's counsel was a copy of an April 7, 2004 letter from Weliver's physician (previously submitted to agency counsel on April 12, 2004) attesting that Weliver had undergone surgery and radiation for breast cancer, that she continues to "experience[ ] pain in her breast," and that "she remains at high risk." (E. 229, 368)

Donna Jones issued her revised proposal to remove letter.[3] He explained that Gartelman's "demeanor" during the telephone interview – and a friendly note of March 24, 2004 containing her telephone number (in contrast to charges of Gartelman being assaulted on March 16, 2004), a week or so before April 1, 2004, given to Weliver – flatly refuted any suggestion that Weliver was threatening and harassing Gartelman, as Faulkner-Martin and Jones claimed in firing Weliver. (*Id.* at 229) Both communications to the Commissioner were *forwarded to the Regional Commissioner Laurie Watkins, Region III* – who gave the matter short shrift. "If Ms. Weliver wishes to appeal the personnel action against her, she may avail herself of the statutory or contractual processes available to her." (E. 231)[4]

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[3] Gartelman was calm and expressed no fear of Weliver, and, instead, revealed orchestrated harassment of Weliver by Faulkner-Martin: she instructed the Security Guard (not an Office employee) to follow and closely monitor Weliver in the office; the Security Guard gives Weliver a hard time, makes fun and harasses her; and most employees in the Office make fun of Weliver and Weliver is harassed and no one tries to help her. Gartelman's oral statements to counsel thus implicitly demonstrated that her subsequent assault charges against Weliver, presented by Faulkner-Martin and Jones in the agency case file (E. 216, 217) were false. (Gartelman's statement of counsel's telephone interview with her is likewise false. *Id.*)

[4] This appears to be a collusive action by SSA. Linda Faulkner-Martin has since been elevated by SSA from District Office Manager, Glen Burnie, Maryland to the position of Human Resources Center Director, Office of Management and Operations Support, Office of Central Operations. (Source: Leadership Directories, Inc.)

Petitioner appealed the removal to the Merit Systems Protection Board which assigned the case to an Administrative Judge. MSPB No. PH-0752-04-0428-I-1. Issues of denial of due process also arose therein in view that the Administrative Judge by her rulings did not allow Petitioner to develop her case during pre-hearing discovery, particularly to depose Rebecca Gartelman, nor issue a subpoena for Gartelman (on whose statements of the toilet bowl assault Petitioner was removed from her employment, *cf. Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963)) to testify at the scheduled hearing a few days

(Continued on following page)

5. On June 6, 2004, after being removed from her employment with SSA, Weliver filed for unemployment insurance benefits with the Maryland State Department of Labor, Licensing and Regulation, Office of Unemployment Insurance, stating: "I was discharged on 06/04 because I am the victim of a horrible discrimination scam. I was accused of shoving a cleaning lady's head into the toilet on 03/29/2004. They are accusing me of harassing Mr. Taylor and others involved in our organization. I did not do any of this." (E. 323)

B. DLLR Administrative Proceedings

A lower level telephone hearing conducted on July 27, 2004 (E. 325) included documents submitted *ex parte* by SSA (E. 319, 320). "The employer provided written statements from Bobby Keaton and Suzy Solis indicating that they had been threatened and harassed by the claimant." (E. 325) On further appeal, an in-person hearing was held before a hearing examiner on October 1, 2004 and was discontinued because Weliver's counsel fell ill. (App. 37) Because of being rushed during that hearing, being in the nature of an "ambush," counsel requested a new hearing by another hearing examiner. *Ibid.* During a de novo hearing on January 11, 2005 before Chief Hearing Examiner Louis Wm. Steinwedel (E. 232) evidence was taken, at

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following the prehearing conference – notwithstanding that the Administrative Judge had committed to issuing the subpoena during the prehearing conference. To withdraw from a hearing at which Petitioner could not present her evidence and with foreseeability would have resulted in an MSPB published decision damaging to her reputation, Petitioner under such duress moved to dismiss. The Administrative Judge's subsequent dismissal of that case was affirmed by the Board of the MSPB and affirmed by the Federal Circuit Court of Appeals. A petition for writ of certiorari was denied by this Court on October 10, 2006 in *Weliver v. Merit Systems Protection Board*, 127 S. Ct. 420 (2006).

which Linda Faulkner-Martin (*id.* at 233), Donna Jones (*id.* at 269) and Rebecca Gartelman (*id.* at 306) testified.

Petitioner, thereafter, filed a motion for a de novo hearing (E. 131-231) based on denial of due process of law: the hearing examiner permitted testimony of gross post hoc rationalizations from employer SSA witnesses Faulkner-Martin and Jones – assertions that were not contained in Jones's April 2, 2004 letter as bases for Petitioner's removal; would not control gratuitous post hoc rationalizations on cross-examination and limit answers to the questions presented, and allowed non-responsive answers during cross-examination of Faulkner-Martin and Jones. (*Id.* at 135-141) The hearing examiner, further, would not require introduction of documentary evidence concurrently with witness testimony to what the documents contained, and permitted all such documents to be introduced as evidence at the conclusion of the witness's testimony (*id.* at 142); and on cross-examination would not admit a document into evidence that was incorporated by reference in the April 2, 2004 letter proposal to remove and related to the direct testimony, and documents to show a defect in the opponent's case in chief. (*Id.* at 143-145) Additionally, the hearing examiner intimidated Petitioner (*id.* at 145-146); made derogatory comments regarding representation by Petitioner's counsel (*id.* at 147-150); and had ex parte communications with SSA counsel. (*Id.* at 150-151)

When jurisdiction was transferred to the Board of Appeals by the hearing examiner, the Board did not refer the case to the Maryland Office of Administrative Hearings for a de novo hearing as recommended by the hearing examiner. (E. 108) Nor did the Board conduct its own de novo hearing to observe the demeanor of Faulkner-Martin, Jones and Gartelman – in addition to having their testimony and documentary evidence properly presented. Contrary to Petitioner's objections (E. 98), the Board incorporated evidence and testimony submitted before the

hearing officer as its record (E. 20, 24) and on June 2, 2005 continued the hearing of the hearing examiner (E. 96, 26) at which Petitioner and other witnesses testified. (E. 24-95)

The Board refused to enter into evidence (E. 54-55) an investigative report disclosing that Gartelman had given perjured testimony before the hearing examiner, and has an extensive criminal record. (E. 193) Also the Board refused to enter into evidence a handwriting analysis of Gartelman's handwriting (E. 86-87) revealing further perjured testimony when Gartelman denied before the hearing examiner of having written the March 24, 2004 note to Weliver that was in her handwriting. (E. 311-312)

The Board of Appeals issued a decision – the only and final DLLR decision – on September 2, 2005. (App. 35) The Board did not evaluate or refer to any particular evidence in the record, did not resolve conflicting evidence of record – neither testimony nor documents – and provided no evidentiary basis for its findings of fact. (*Id.* at 39) The Board's decision, having incorporated the hearing examiner's hearing and its continued hearing as one proceeding, is the following:

> The Board of Appeals has *considered all the evidence presented*, including the *testimony offered at the hearing*. The Board has also considered all the documentary evidence introduced in this case, as well as the Department of Labor Licensing and Regulation's documents in the appeal file.
>
> The Board of Appeals finds the testimony of the employer's witnesses and the claimant's witness, Rebecca Gartelman, to be more credible than claimant's testimony. The *overwhelming weight of the credible evidence* supports a finding that the claimant was discharged for gross misconduct within the meaning of Section 8-1002. [Emphasis added.]

The Board held:

a) The claimant violated a management directive, issued to her orally and on December 10, 2003 to refrain from calling co-workers at their homes and harassing them. She called three co-workers at home during evening hours of March 4, 2004 to harass them.

b) Claimant refused to meet with her supervisor Donna Jones on March 4, [2004] to discuss allegations from her co-workers, and that claimant blew a kiss to Donna Jones and patted her behind when leaving the office that day.

c) On March 5, 2005, the claimant interrupted the speaker at a graduation ceremony for herself and some co-workers and walked out before the ceremony was concluded, and

d) later that day stated to Ms. Jones "I am going to kill you."

e) On or about March 16, 2004, the claimant began to harass Ms. Gartelman: telling Ms. Gartelman that she was being watched and was going to lose her job; pressured Ms. Gartelman to assist her in making complaints against her employer; claimant wanted Ms. Gartelman to sign statements attesting to the fact that claimant was being harassed by the employer and her co-workers; on one occasion claimant pushed Ms. Gartelman into a filing room; claimant made threats against Ms. Gartelman and her child; and beginning March 16, 2004 made nightly calls to Ms. Gartelman's home, calling hour after hour until as late as 11:00 p.m.

f) On March 29, 2004, while Ms. Gartelman was working in one of the building bathrooms, claimant came up behind Ms. Gartelman, tried to push her head into the commode and did so far enough to cause the ends of Ms. Gartelman's hair to become wet; and while doing this the claimant was again telling Ms. Gartelman that if she did

> not help her, by confirming that the claimant was being mistreated on the job, Ms. Gartelman would be hurt in some way.
>
> g) Following an earlier proposal to remove claimant from her position, upon learning of claimant's actions towards Ms. Gartelman that proposal was withdrawn and a new proposal was issued on April 2, 2004, resulting in the immediate discharge by her employer.

The Board again concluded that Petitioner "was discharged for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002." (*Id.* at 43)

C. Proceedings in the Circuit Court for Anne Arundel County, Maryland

The Circuit Court affirmed the decision of the Board of Appeals.

The foregoing due process issues, embraced by the Board's refusal to provide a de novo hearing, were initially raised by Petitioner upon appeal for judicial review of the Board's decision in the Circuit Court. Notwithstanding, the Circuit Court passed over the due process issues while connoting that all testimony and evidence had been presented at the Board's hearing – disregarding the hearing proceeding conducted by the hearing examiner, and giving no recognition to Petitioner's request for a de novo hearing.

In disregard of Maryland judicial review provisions (*see* page (i), *supra*), the Circuit Court also provided no meaningful review and/or analysis of the Board's decision to ascertain the evidentiary basis as substantial evidence that the Board relied on to support its findings of fact (the court referring to evidence generally – post hoc rationalizations) And so without referring to particular evidence,

and recognizing contrary evidence, the Circuit Court stated: "The record indicated that there were several instances of Ms. Weliver violating an employer's directive to refrain from calling co-workers after hours. It contained evidence that Ms. Weliver threatened co-workers, made obscene gestures, and even physically attacked a co-worker [sic] by forcing her head into a toilet." The decision of the Circuit Court is the following (App. 30):

> *At the Board of Appeals hearing*, both Ms. Weliver and the employer had equal opportunity to present evidence concerning the circumstances of Ms. Weliver's dismissal. At the conclusion of the hearing, the Board held that the employer's testimony and evidence concerning the dismissal was more credible than the evidence provided by Ms. Weliver.
>
> The Court must decide whether there was enough substantial evidence presented at the hearing to support the Board of Appeals decision that "*[t]he overwhelming weight of the credible evidence* supports a finding that the claimant was discharged for gross misconduct within the meaning of Section 8-1002." *The Court finds that there is substantial evidence in the record to support the Board's finding* that Ms. Weliver was discharged for "gross misconduct." The record indicated that there were several instances of Ms. Weliver violating an employer's directive to refrain from calling co-workers after hours. It contained evidence that Ms. Weliver threatened co-workers, made obscene gestures, and even physically *attacked a co-worker* [sic] by forcing her head into a toilet.
>
> The preceding examples of Ms. Weliver's conduct clearly amount to substantial evidence that a reasonable person could rely upon to find her guilty of gross misconduct. Since this Court cannot substitute its own judgment in light of the facts, it must uphold the Board of Appeals findings. Therefore, this Court finds that the Board

of Appeals did not err in its decision. [Emphasis added.]

D. Proceedings in the Court of Special Appeals of Maryland

The due process issues were similarly raised before the CSA. The CSA affirmed the lower court and the decision of the Board of Appeals. In Maryland, rather than reviewing errors of the Circuit Court's review of the agency administrative decision, judicial review at any court level is review of the administrative decision directly. *Spencer v. Md. State Board of Pharmacy, supra*, 846 A.2d at 346; *Ahalt v. Montgomery County*, 113 Md. App. 14, 20, 686 A.2d 683, 686 (1996).

The CSA's opinion contains many misstatements of fact. The opinion is largely devoted to discussion and evaluation of the evidence, and resolution of conflicts in the evidence, as a substitute for that which is wholly absent to support the Board of Appeals findings of fact. In this manner, the CSA ruled as to each that the Board's findings of fact were supported by substantial evidence. The opinion thus contains a series of post hoc rationalizations that the CSA otherwise recognizes as being proscribed. (App. 26, n. 14)

The CSA's reasoning, too, is designedly inconsistent. See, *e.g.*, note 9 (App. 15) where the court discusses that the Board could not properly make a demeanor-based credibility assessment of Faulkner-Martin, Jones and Gartelman based on a transcript of their testimony presented before the hearing examiner, and in juxtaposition states that while the Board was able to observe the demeanor of Weliver during her testimony: "[t]he testimony of Gartelman, while not made in the presence of the Board, was corroborated and documented by two other witnesses, Faulkner and Jones," and is thus substantial

evidence that the "Board could reasonably infer that Gartelman was telling the truth." (App. 23)

The CSA also discounted documents that Petitioner sought to put into evidence before the Board: the investigative report of Gartelman's testimony before the hearing examiner documenting perjury, and her extensive criminal record; and analysis of Gartelman's handwriting further documenting perjury before the hearing examiner (while incorrectly stating as a reason that "samples of Gartelman's handwriting had not been identified and introduced into evidence during the prior hearing.") (App. 22, n. 11 and 12)

The court noted that Petitioner moved for a de novo hearing and raised due process issues embraced by the Board of Appeals' decision but it nonetheless affirmed that decision. (The court refers, too, to the first de novo hearing which is irrelevant.) (App. 24)

> Weliver contends that she was denied due process of law at the January 11, 2005 hearing before Examiner Steinwedel.[*] She offers numerous reasons in support, none of which are persuasive."
>
> [*] As discussed *supra*, Weliver moved for a *de novo* hearing following the January 11, 2005 hearing. Examiner Steinwedel removed the case to the Board of Appeals and the Board denied Weliver's request for a *de novo* hearing, holding a continued hearing instead. Weliver had already been granted a *de novo* hearing after her first hearing before Examiner Sapp was continued due to her counsel becoming ill.

The CSA misreads *Shipbuilding & Drydock Co., Inc. v. Md. Comm. On Human Relations,* 70 Md. App. 538, 552, 521 A.2d 1263, 1270 (1987) regarding non-admissibility of a pro hoc rationale during an administrative proceeding when it states that "this Court was merely noting that the

hearing examiner made an appropriate *credibility determination* when assessing the employer's reasons for terminating the employee." (Emphasis added.)). (App. 26, n. 14) To the contrary, the court in that case refused to accept as evidence, a post hoc rationale, a reason for [claimant's] denial of promotion by the company: a knee injury (injured in 1976), since it was not raised in the employer's position paper of 25 February 1980 as asserted, nor was it discussed at the 26 February 1980 fact finding conference of the Commission's investigator. *Shipbuilding & Drydock Co., Inc., supra,* 521 A.2d at 1270, n. 3) "Credibility determination," moreover, applies to witness testimony, discussed in the opinion as relating to other evidence in the case.

The CSA wrongfully observes that "Weliver's improper conduct during the training class was specifically addressed by Jones in the 'Proposal to Remove.'" (App. 26) The quoted commentary is contained in the April 2, 2004 proposal to remove, in part (a): "Failure to follow a management directive," pertaining to telephoning co-workers at home, not in part (b) "Conduct unbecoming a Federal employee." (E. 176) Inasmuch as that statement was not referred to by SSA as purported conduct unbecoming a Federal employee, claiming employee misconduct, it is a post hoc rationale to refer to alleged conduct during a training class as a part (b) conduct charge.

Rather than the hearing examiner controlling witnesses, the CSA observes that "all the witnesses [were given] considerable leeway." (App. 27 n. 15) But such leeway was in permitting gross post hoc rationalizations that were accepted by the hearing examiner, e.g., by Faulkner-Martin, as he opined: "I think that's the answer to the question." (E. 260)

With regard to the hearing examiner permitting testimony on direct examination respecting a document

without requiring that the document be concurrently introduced into evidence, the CSA posits on the one hand that hearing examiners are not bound by court rules of evidence or procedures (App. 27-28), but on the other hand notes that "[W]hile administrative agencies are not constrained by technical rules of evidence, they must observe basic rules of fairness as to the parties appearing before them so as to comport with the requirements of due process afforded by the Fourteenth Amendment." (*Id.* at 25)

The CSA decision affirming the Circuit Court and the Board of Appeals decisions was issued on November 3, 2006. (App. 1) Petitioner timely filed a motion for reconsideration on November 30, 2006, and the motion for reconsideration was denied on December 21, 2006. (App. 29)

E. Proceedings in the Court of Appeals of Maryland

Petitioner timely filed a petition to the Court of Appeals for writ of certiorari on January 3, 2007. The court denied the petition on March 16, 2007. (App. 44) Petitioner timely filed a motion for reconsideration of that order on April 13, 2007, and the motion for reconsideration was denied June 8, 2007. (App. 45)

REASONS FOR GRANTING THE PETITION

At every turn, when disregarding established rules and principles of jurisprudence of this Court and State of Maryland, Petitioner had been denied due process of law in the administration of her claim for unemployment insurance benefits. Such denial maintains SSA's libel of Petitioner assaulting Rebecca Gartelman, an office cleaning maintenance worker, including pushing her head into

a toilet bowl. And, inter alia, on this basis, Petitioner was removed from her employment with SSA.

When not providing Petitioner a de novo hearing and continuing the hearing of the hearing examiner, the DLLR Board of Appeals incorporated that hearing transcript as its own and all the due process deficiencies therein: "All testimony and documents entered into evidence at the hearing held on January 11, 2005 before Chief Hearing Examiner Louis Wm. Steinwedel are in evidence before the Board of Appeals and no additional testimony is needed from the witness having already testified." (E. 96) Additionally, the Board of Appeals superimposed its own due process deficiencies by improper consideration of the evidence in this case, and the manner in which it rendered its decision.

Upon judicial review, the Circuit Court for Anne Arundel County, Maryland, failed to give recognition to the proceedings of the hearing examiner and the due process issues raised, and disregarded the State APA provisions when affirming the decision of the Board of Appeals. The Court of Special Appeals of Maryland, although explicitly recognizing due process deficiencies in the decision of the DLLR Board of Appeals, yet affirmed the decisions of the Circuit Court and Board of Appeals. Thereafter, the Court of Appeals, highest court in the State of Maryland, would not accept the case for review and denied Petitioner's petition therein for writ of certiorari.

Petitioner's only, and final, recourse to obtain due process of law and to achieve justice in this case – and to remedy SSA's wrongful removal of Petitioner from her employment based on a libel perpetrated by SSA – is by review of this Court.

I. The Hearing Examiner Denied Petitioner Due Process of Law Which Was the Basis for Petitioner's Motion for a De Novo Hearing

a. SSA counsel was permitted free reign to question employer SSA witnesses Faulkner-Martin and Jones, so to present pro hoc rationalizations for Petitioner's removal from her employment that were not contained in the letter removal documents of April 2, 2004 and June 1, 2004. (E. 239)

> BY MR. MELENDEZ: Continuing on, and let's discuss Ms. Weliver's behavior while attending training class. . . . Did there come a time when students in that training class came to you to tell you that Ms. Weliver was –
>
> MR. EIGLES: Your Honor, if I may object, there isn't anything in the decisions as a basis for removal –
>
> * * *
>
> MR. STEINWEDEL: Well, *I'm going to admit that because it's the way we operate here.* And I'm going to overrule that objection. If you continue to make it, I'm going to continue overruling it, so *let's get that settled up front.*
>
> MR. EIGLES: All right, Sir, *I'm just following what they presented as a basis for removal.*
>
> MR. STEINWEDEL: It's going to be admitted. The case may or may not turn on any of these elements, but I have to hear what the employer wants to testify to, and *I will hear it. Okay, let's proceed.* [Emphasis added.]

The hearing examiner continued to permit extemporaneous post hoc rationalizations of SSA's witnesses on cross-examination. [E. 258-259]

> Q. Did Monique ever talk to you about the phone calls Ms. Weliver made to her?

A. Yes. Monique told me that she had talked with Ms. Weliver, but Monique told me, "I will handle it myself."

Q. Did Monique ever tell you that she asked Ms. Weliver to call her?

A. No. When Monique approached to talk with me, she came to tell me that Fatima was saying things to her that she didn't like. And she handled it herself. That was the extent of Monique's talking to me. She never signed a statement –

Q. That's fine. So what's referred to here, that Ms. Weliver called her, and you say she – Monique had never discussed with you that she asked Ms. Weliver to call her, is that your statement?

A. Monique never said anything to me about who initiated anything . . . in terms a call being placed.

Q. That's fine.

A. She just came to say that Fatima was harassing her and she would handle it herself.

Q. That's fine, but my question was did she ask – had she told you that she had asked Ms. Weliver to call you and you said she had not discussed that with you.

The question was whether Monique had told Faulkner-Martin that Monique asked Petitioner to call her. The answer was given: no. No further question was asked.

A. *Let me make something clear that maybe didn't come out before.* Ms. Weliver made friends initially with everyone in the –

Q. Answer my question please.

MS. JASNER: Objection, Your Honor.

Q. Objection, objection.

MR. MELENDEZ: I believe she's trying to answer it.

MR. EIGLES: But she –

THE WITNESS: I'm trying to answer the question.

MR. STEINWEDEL: We finally got to a question and now we're getting an answer. You opened the door to this.

MR. EIGLES: Well I asked if Monique –

THE WITNESS: I want to tell you how Ms. Weliver came to have these phone numbers.

MR. STEINWEDEL: This is responsive to your question, you went there.

MR. EIGLES: All right.

THE WITNESS: Fatima approached the entire staff, the entire training class and said she likes to get together and go out after hours –

MR. EIGLES: Oh, come on.

THE WITNESS: And she wanted phone numbers.

MR. EIGLES: Objection, Your Honor.

THE WITNESS: Can I finish my statement?

MR. EIGLES: *This goes well beyond my question,* Your Honor.

MR. STEINWEDEL: No, it doesn't. You asked for an answer and she's giving you an answer.

MR. EIGLES: I asked about –

MR. STEINWEDEL: You know, there is an old saying, counsel, be careful what you ask for, you might get it.

MR. EIGLES: I asked about Monique and now she –

THE WITNESS: *But I think this answer will address Monique's issue* ***and*** *everyone else's* –

MR. STEINWEDEL: *I'm going to permit the answer.* [Emphasis added.]

Maryland law proscribes post hoc rationalizations during review of agency decisions. *Bd. of Educ. of Montgomery County*

v. Paynter, 303 Md. 22, 41, 491 A.2d 1186, 1196 (1985); *Shipbuilding & Drydock Co., Inc. v. Md. Comm. on Human Relations, supra.*

Post hoc rationalizations likewise are clearly proscribed as the Court set out in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965):

> Although Board counsel in his brief and argument before this Court has rationalized the different unit determinations in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, *the integrity of the administrative process requires that "courts may not accept appellate counsel's post hoc rationalizations for agency action. . . ."* [citations omitted] For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. *Such action would not vindicate, but would deprecate the administrative process* for it would "propel the court into the domain which Congress has set aside exclusively for the administrative agency." [Emphasis added.]

The law, however, was not applied in this case.

b. The hearing examiner also would not require SSA counsel to submit documents as evidence concurrently with direct testimony offered about what they contain, and permitted all documents to be introduced after conclusion of the testimony. This served to curtail proper cross-examination as to the accuracy of the testimony of what the documents contain. (E. 244, 241)

> STEINWEDEL: – at this moment, the hearing doesn't recognize that there is a document until it is submitted into evidence. There is no document in evidence at this point. *What is being offered is direct testimony, and certainly I have no grounds to refuse that.*

> MR. EIGLES: Direct testimony about what the document states –
>
> MR. STEINWEDEL: *What did I just say about there being no document in evidence at this time?* There may be admission of a document in evidence at a later time, or there may not, I have no way of knowing that. [Emphasis added.]

The hearing examiner thus disregarded "[t]he danger of [a witness] mistransmitting critical facts which accompanies the use of written copies or recollection, but which is largely avoided when an original writing is presented to prove its terms, justifies preferences for original documents." *McCormick on Evidence* (2d Ed., 1972), quoted in *State of Maryland v. Brown*, 129 Md. App. 517, 522, 743 A.2d 262, 264-265 (1999). *Compare, too*, the common-law "rule of completeness," which underlies *Federal Rules of Evidence 106. Beech Aircraft Corporation v. Rainey*, 488 U.S. 153, 172 (1988). "We take this to be a reaffirmation of the obvious: that when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant."

c. On cross-examination of SSA witnesses, Faulkner-Martin and Jones, the hearing examiner, too, would not permit introduction of a document into evidence that was incorporated by reference in the April 2, 2004 letter proposal to remove (E. 255-256), nor permit introduction of other documents to supply a defect in the proof presented during SSA's case in chief. (E. 293)

> MR. EIGLES: Can we enter this into evidence?
>
> EXAMINER STEINWEDEL: Refer to it first.
>
> MR. EIGLES: Refer to it? All right. I had refrained from introducing documents into evidence because you indicated that this was cross-examination.
>
> EXAMINER STEINWEDEL: I didn't say introduce it into evidence. I said refer to it.

MR. EIGLES: Refer to it? All right.

EXAMINER STEINWEDEL: There's a difference.

MR. EIGLES: All right, all right, all right.

Restricting the record on cross-examination is contrary to *Weil v. Terrell Air Conditioning*, 48 Md. App. 439, 442, 759 A.2d 1071, 1072-1073 (1981). To similar effect, in *Beech Aircraft Corporation v. Rainey, supra,* at 168, the Court held: "And of course it goes without saying that the admission of a report containing 'conclusions' is subject to *the ultimate safeguard – the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions.*" (Emphasis added.)

II. A. The DLLR Board of Appeals Did Not Properly Consider the Evidence, And Credibility of Witnesses Based On Transcript Testimony Upon Continuing the Hearing of the Hearing Examiner

In failing to provide Petitioner a de novo hearing to remove the due process deficiencies of the hearing examiner's proceeding by having witness testimony be presented anew, and to permit documentary evidence to be admitted with due regard to due process considerations, the Board of Appeals, too, denied Petitioner due process of law.

First, the Board of Appeals states in its decision that it "considered all the evidence presented," notwithstanding that the Board refused to admit into evidence the investigative report of Gartelman's testimony before the hearing examiner that reveals that she gave perjured testimony – and that she has an extensive criminal record.[5] The Board

[5] The Board denied admission of the report of the private investigator because the investigation "occurred almost a year after the

(Continued on following page)

also refused to admit into evidence the report of a handwriting analyst that further establishes that Gartelman gave perjured testimony with regard to her March 24, 2004 note (E. 215) that she denied under oath of having written.[6] On its face, the Board incorrectly held that Gartelman's testimony is more credible than Petitioner's testimony with regard to Gartelman's contentions of Petitioner having physically assaulted her. Reports of unbiased experts are relevant, admissible, and substantial evidence in an administrative hearing. *Cf. Richardson v. Perales*, 402 U.S. 389 (1971)

Secondly, the Board of Appeals made a determination of credibility of SSA witnesses Faulkner-Martin and Jones, and Gartelman, based on the transcript testimony before the hearing examiner and thus had no opportunity to observe these witnesses to make a demeanor based assessment. The CSA affirmed the Board's decision irrespective of its extensive discussion of Maryland law that "[a] 'testimonial inference' can only be drawn by a trier of fact who actually observes the witness . . . [w]hereas inferences drawn from the evidence itself -- such as the number of witnesses testifying to the same version of events, the likelihood that one version of events is true based on logic

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alleged assault and was based on a few observations of the area" (E. 55), although the investigator had also questioned employees in offices near the restroom off the building lobby who worked there when the alleged incident occurred. (E. 54, 193)

[6] The Board refused admission on grounds that the note had not been introduced into evidence before the hearing examiner. (E. 86-87) The note, however, was extensively described and identified at the hearing, and the hearing examiner would not recognize it as evidence because of a slight rumpling in a copy machine. (E. 312) The Board, further, indicated that Gartelman was not present for cross-examination (E. 86), notwithstanding that it denied Petitioner's motion for a de novo hearing. The Board also disregarded counsel's request to have Gartelman called back for further testimony. (E. 87)

or common sense, or documentary evidence – can be made absent observation of the witnesses." (App. at Op. 14, n. 9) The CSA further noted that "the Board did not observe three of the witnesses in this case, and, therefore, could not make demeanor-based credibility assessments." *Ibid.*[7] *Anderson v. Dep't of Pub. Safety & Corr. Serv's*, 330 Md. 187, 623 A.2d 198 (1993); *Dept. of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 299-300, 641 A.2d 899, 907 (1994).

In like manner, the Court held in *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985):

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for *only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.* [Emphasis added.]

B. The DLLR Board of Appeals Issued a Decision of Findings of Fact Without Setting Forth an Evaluation of the Evidence Presented, Without Resolving Conflicts In the Evidence, And Without Presenting an Evidentiary Basis to Support Its Findings of Fact

The failure of the Board of Appeals, to evaluate the evidence, to resolve conflicts in the evidence, and present

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[7] The CSA's statement that "Weliver does not raise this argument on appeal" is erroneous. The CSA contrarily notes that "Weliver makes a passing reference in her brief to the inability of the Board to observe the demeanor of the three initial witnesses." Petitioner's motion for a de novo hearing directly sought to have their testimony presented anew before the Board.

an evidentiary basis to support its findings of fact alone renders its decision a denial of due process.

The Board asserts that it considered all the evidence "including testimony" offered at the hearing and "all the documentary evidence introduced in this case." Apart from its conclusion that the "overwhelming weight of the credible evidence" supports a finding that the claimant was discharged for gross misconduct, nowhere does the Board relate what the "overwhelming evidence" is that supports its findings of fact. As it does not discuss the evidence, it has not evaluated the evidence, and has thus presented no evidentiary basis for its findings of fact – apart from lack of efficacy of the evidence introduced.

The Board's findings of fact plainly appear to be simply an iteration of the false charges of Faulkner-Martin and Jones in the April 2, 2004 letter proposal to remove Petitioner from her employment.

Under Maryland law, "the examiner [is] to focus on the evidence presented and its sufficiency to support a particular conclusion." *Forman v. MVA*, 332 Md. 201, 220-221, 630 A.2d 753, 764 (1993). Resolving conflicting evidence and properly determining credibility of witnesses are duties of the Board as trier of fact. *Baltimore Lutheran High School Ass'n, Inc. v. Employment Sec. Admin.*, 302 Md. 649, 663, 490 A.2d 701, 708 (1985). Evidence stated to support a particular conclusion is "substantial" if a reasoning mind might accept it to support the conclusion reached by the agency. *Spencer v. Md. State Board of Pharmacy*, *supra,* 846 A.2d at 349; *Bd. of Educ. of Prince George's County v. Waeldner*, 298 Md. 354, 363, 470 A.2d 332, 336 (1984). These fundamental principles of due process were disregarded by the Board.

The Court similarly observed *in NLRB v. Metropolitan Life Ins. Co., supra*, at 442-443, that

> [D]ue to the Board's lack of articulated reasons for the decisions in and distinctions among these cases, the Board's action here cannot be properly reviewed. When the Board so exercises the discretion given to it by Congress, it must "*disclose the basis of its order*" and "give clear indication that it has exercised the discretion with which Congress has empowered it." [Emphasis added.]

Accord: Goldberg v. Kelly, supra.

III. The Maryland Judiciary Denied Petitioner Due Process of Law

Notwithstanding the clear multitudinous due process deficiencies of the decision of the DLLR Board of Appeals, the Circuit Court for Anne Arundel County, Maryland, and the Court of Special Appeals of Maryland affirmed that decision. And the highest court of the State, Court of Appeals of Maryland, denied review. Although the established legal principles of due process applicable to this case are clear in Maryland law and as enunciated by this Court, the Maryland judiciary refrained from applying them in this case. By so failing to properly apply the law, the Maryland judiciary itself effected a denial of due process of law.

Recognized elements of procedural due process required of the States under the Fourteenth Amendment are fundamental to the administration of justice. "[I]t is normally 'within the power of the State to regulate procedures under which its laws are carried out,' . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it *offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.*'" (Emphasis added.) *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996).

Going back to 1876, Chief Justice Waite articulated the term "due process of law" to mean "a course of legal

proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights." *Kennard v. Louisiana*, 92 U.S. 480, 481 (1876). Unlike *Kennard* where statutory procedures, followed by the State judiciary, were reviewed as to whether they complied with due process, in the instant case established prescribed rules to afford due process were not followed by the State judiciary.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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August 31, 2007

APPENDIX A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 20

September Term, 2006

FATIMA G. WELIVER

v.

BOARD OF APPEALS
DEPARTMENT OF LABOR, LICENSING
AND REGULATION, ET AL.

Eyler, Deborah S.,
Barbera,
Rodowsky Lawrence F.,
(Ret'd, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: November 3, 2006

Fatima G. Weliver, the appellant, applied for unemployment benefits after being terminated from her job with the Social Security Administration ("the Agency"). A claims specialist for the Department of Labor, Licensing, and Regulation ("DLLR"), the appellee, denied her claim, finding that she had been terminated for gross misconduct and, hence, pursuant to Md. Code (1999 Repl. Vol.) section

8-1002 of the Labor and Employment Article ("LE"), was not entitled to benefits. Weliver appealed to the DLLR Board of Appeals ("the Board"), which affirmed the decision of the claims specialist. She then brought an action for judicial review in the Circuit Court for Anne Arundel County. The court upheld the Board's decision.

On appeal to this Court, Weliver raises eight questions for review,[1] which we have rephrased, reordered, and combined:

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[1] The questions, as posed by Weliver, are:

1. Did the Board deny Appellant due process of law when not granting Appellant a *de novo* hearing and continued a prior hearing proceeding of a hearing examiner that contained due process deficiencies, and thereafter rendered a decision based on such combined hearing record?

2. Did the Board err in deciding that Appellant violated a management directive of December 10, 2003 directing that she not call co-workers at home after work hours?

3. Did the Board err in deciding that Appellant refused to meet with her supervisor Donna Jones on March 4, 2004 and that Appellant blew a kiss to Ms. Jones and patted her behind when leaving the office that day?

4. Did the Board err in deciding that Appellant offensively interrupted a speaker at a training exercise graduation on March 5, 2004?

5. Did the Board err in deciding that Appellant threatened her supervisor, Donna Jones, on March 5, 2004 with the statement "I am going to kill you?"

6. Did the Board err in deciding that Appellant committed assaults on Rebecca Gartelman on March 16, 2004?

7. Did the Board err in deciding that on March, 29, 2004 Appellant committed assaults on Ms. Gartelman including pushing her head into a toilet bowl?

8. Did the Board err in deciding that SSA's proposal to remove of April 2, 2004 was substituted for SSA's March 24,

(Continued on following page)

I. Was there substantial evidence to support the Board's findings of fact in support of its decision?

II. Was the appellant afforded due process of law in her hearing before a hearing examiner?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

Weliver began working for the Agency as a claims representative in September of 1999. From 2001 until her eventual termination, she worked at the Glen Burnie office under the supervision of Donna Jones, the Assistant District Manager.

On April 2, 2004, Jones issued a "Proposal to Remove" Weliver from her job.[2] The proposal stated in part:

> I am proposing your removal from your position as Claims Representative, and from the Federal service, no earlier than thirty (30) calendar days from the date you receive this notice, because of

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2004 proposal to remove based on "learning of claimant's action toward Ms. Gartelman?"

[2] Jones had issued a prior "Proposal to Remove" on March 24, 2004. The April 2 proposal superseded the March 24 proposal because the April 2 proposal contained additional facts unknown at the time of the March 24 proposal. Aside from the additional facts, the two proposals were identical. One of the Board's findings of fact disputed by Weliver concerns the reason Jones issued the April 2 proposal. We shall discuss her argument *infra*.

> your (a) failure to follow a management directive, and (b) conduct unbecoming a Federal employee.[3]

Weliver was placed on administrative leave without pay.

In a letter dated June 1, 2004, Linda Faulkner-Martin, the District Manager of the Glen Burnie office, concluded that Jones's "Proposal to Remove" Weliver was adequately supported and that, in light of Weliver's extensive disciplinary record with the Agency, termination was the appropriate course of action. Weliver's termination became effective June 4, 2004.

On June 6, 2004, Weliver filed a claim for unemployment insurance benefits with the DLLR. She alleged that she had been fired for "simple or no misconduct." Her claim was challenged by the Agency. On July 27, 2004, the parties participated in a telephone hearing before a DLLR claims specialist. The claims specialist made the initial benefits determination that Weliver was fired for gross misconduct and, therefore, pursuant to LE section 8-1002, was not entitled to benefits.

On August 9, 2004, Weliver appealed the initial benefits determination to the Appeals Division of the DLLR. A hearing was scheduled for August 30, 2004, on the issue of:

> Whether the claimant's separation from this employment was for a disqualifying reason within the meaning of [LE sections 8-1002-1002.1] (Gross/Aggravated Misconduct connected with

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[3] The specific allegations raised in one Proposal to Remove will be discussed *infra*.

> the work), 1003 (Misconduct connected with the work) or 1001 (Voluntary Quit for good cause).

After numerous postponements, a hearing was held on October 1, 2004, before DLLR Hearing Examiner Sapp.[4] The hearing could not be completed that day, however, because Weliver's attorney became ill. The hearing was continued and counsel were asked to submit dates for a future hearing.

In the meantime, Weliver's lawyer wrote to the Director of the Appeals Division of DLLR and requested a *de novo* hearing before a different hearing examiner. His letter stated:

> I have much reservations concerning the conduct of the hearing in that the hearing officer was seeking to have me rush through it and did not permit me to engage in a deliberative process to develop my questions on cross-examination of the first Agency witness. . . . It appeared to me to be in the nature of an "ambush" and a race out the door, . . . I would appreciate your review of the tape, and as appropriate assign another hearing officer to the case.

Weliver's counsel also complained that much of the testimony by Agency witnesses was hearsay. He asked for leave to take depositions prior to the next hearing.

The Agency opposed Weliver's requests, arguing that a *de novo* hearing was not necessary, because the prior hearing had been conducted "according to due process and federal hearing standards," and that Weliver's "attorney's

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[4] Hearing Examiner Sapp's first name is not reflected in the record.

failure to subpoena witnesses or otherwise prepare for the hearing does not provide a basis for a *de novo* hearing."[5]

Weliver's request for a *de novo* hearing was granted on October 25, 2004. After further postponements, a *de novo* hearing was held on January 11, 2005, before Chief Hearing Examiner Louis W. Steinwedel.[6] The Agency called two witnesses – Faulkner-Martin and Jones. One of Weliver's witnesses, Rebecca Gartelman, was called out of order due to her work obligations. The hearing was then continued.[7]

On February 22, 2005, Weliver filed a "Motion for New *De Novo* Hearing to Provide Due Process of Law." She argued that 1) the hearing space was insufficient; 2) the hearing examiner had improperly allowed the Agency to give its opening statement second; 3) the hearing examiner had improperly admitted testimony by Agency

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[5] At the October 1, 2004 hearing, the Agency called Faulkner-Martin, and completed direct examination of her. During her cross-examination, counsel for Weliver asked for a continuance, stating that he felt ill. It is unclear whether Weliver's counsel subpoenaed any witnesses for the hearing, but the Agency specifically requested in its response that "counsel should be permitted to present only those witnesses present at the October 1, 2004 hearing."

[6] Weliver's lawyer asked to subpoena 21 witnesses, and said he planned to call nine additional witnesses who would appear voluntarily. The Appeals Division allowed him five subpoenas. He also asked that the hearing be scheduled for three consecutive days. A one-day hearing was scheduled instead.

[7] The hearing ended at approximately 3:13 p.m. The hearing examiner had informed the parties at the start of proceedings that he would need to leave for another appointment at 3:30 p.m. At the close of Gartelman's testimony, counsel for Weliver sought to call one additional witness prior to the end of the hearing. The hearing examiner denied this request because he did not believe the testimony could be completed prior to 3:30.

witnesses about conduct by Weliver not covered in the "Proposal to Remove" and other impermissible "post hoc rationalizations" for her termination; 4) the hearing examiner had improperly allowed the Agency to question witnesses about documents not in evidence and to introduce all the documents at the close of its direct examinations, and would not allow counsel for Weliver to introduce a document during cross-examination; 5) the hearing examiner intimidated Weliver when she tried to speak to him; 6) the hearing examiner improperly criticized the performance of counsel for Weliver during the hearing; 7) the hearing examiner spoke *ex parte* with Agency counsel regarding Gartelman; 8) Gartelman falsely testified at the hearing; and 9) the hearing examiner concluded the hearing prematurely and denied Weliver the opportunity to present a final witness.

The Agency opposed the motion, stating:

> [O]pposing counsel seeks a *de novo* hearing simply because he is not satisfied with the Hearing Examiner's rulings, and, as a result, wants to start over again, as he has in the past.

The Agency asserted that the hearing was conducted properly and consistent with due process.

On March 23, 2005, Chief Hearing Examiner Steinwedel ruled on the motion as follows:

> The allegations raised in [Weliver's] Motion are without merit and are rejected. However, due to the nature of the allegations and the possible perception of bias, and in consultation with the Board of Appeals, this case is hereby removed to the Board of Appeals, pursuant to LE, Section

8-509 of the Maryland Unemployment Insurance Law.

The Board of Appeals assumed jurisdiction over the case. The Agency filed a "Motion to Limit Testimony and Evidence in Board of Appeals Hearing," asking the Board to limit the live testimony at the hearing to those witnesses who had not yet testified and that it accept the exhibits introduced into evidence at the hearing before Chief Hearing Examiner Steinwedel. Weliver filed an opposition, seeking a *de novo* hearing. The Board of Appeals ruled the hearing would be a continuation of the one that had started before Chief Hearing Examiner Steinwedel and that "[a]ll testimony and documents entered into evidence" at that hearing would be "in evidence before the Board of Appeals." The continued hearing was scheduled for June 2, 2005.

At the June 2 hearing, Weliver called four witnesses and testified on her own behalf. The hearing was concluded that same day.

On September 2, 2005, the Board of Appeals issued its final decision. It found that Weliver was fired for gross misconduct and therefore was not entitled to unemployment insurance benefits.

Weliver filed a timely action for judicial review of the Board's decision. The DLLR filed a notice with the court that it intended to participate in the action. As noted above, the circuit court affirmed the final Agency decision.

We shall recount additional facts as pertinent to the issues.

DISCUSSION

Weliver contends that the DLLR erred factually, by making numerous incorrect findings of fact, and legally, by denying her due process of law.

Our role as an appellate court is to review the final agency decision, not the decision of the circuit court. *Ahalt v. Montgomery County,* 113 Md. App. 14, 20 (1996). The standard of review we employ in reviewing a decision of the DLLR Board of Appeals is set out in LE section 8-512(d):

> In a judicial proceeding under this section, findings of fact of the Board of Appeals are conclusive and the jurisdiction of the court is confined to questions of law if:
>
> (1) findings of fact are supported by evidence that is competent, material, and substantial in view of the entire record; and
>
> (2) there is no fraud.

Thus, factual findings of the Board are accorded great deference. *Dep't of Econ. & Employment Dev. v. Taylor,* 108 Md. App. 250, 261-62 (1996). Legal determinations are reviewed *de novo,* however. *Liberty Nursing Center, Inc. v. Dep't of Health & Mental Hygiene,* 330 Md. 433, 443 (1993).

We will begin by deciding whether there is substantial evidence in the agency record to support the factual findings that Weliver challenges. We then will address Weliver's due process argument.

In reviewing the factual errors asserted by Weliver, we apply the "substantial evidence test," *i.e.*, we determine

whether the facts found by the Board are supported by substantial evidence in the agency record. *State Dep't of Assessments & Taxation v. Reier,* 167 Md. App. 559, 590 (2006). Evidence is "substantial" if a reasoning mind might accept it as adequate to support the conclusion reached by the agency. *Bd. of Educ. of Prince George's County v. Waeldner,* 298 Md. 354, 363 (1984).

Weliver contests numerous factual findings.

A. Violation of Management Directive

The "Proposal to Remove" accused Weliver of violating a December 10, 2003 management directive from Jones prohibiting Weliver from telephoning at their homes co-workers who also were classmates in her training class. The Board made the following findings of fact in regard to this issue:

> This directive was issued by the employer in response to complaints they [sic] had received from co-workers regarding the claimant's harassment of them. The claimant violated this directive when she made phone calls to three co-workers [sic] homes during the evening hours of March 4, 2004. The claimant called one co-worker, and proceeded to scream at and accuse the co-worker of harassing her. The claimant called another co-worker and after receiving no initial answer repeatedly called the co-worker's home telephone number approximately every fifteen minutes from 5:30 to 8:30 p.m. The claimant admitted calling her co-workers in violation of the management directive.

Weliver initially argues that Jones's directive was unlawful because the Agency had no authority to control employee behavior outside of the work site.

The Agency introduced into evidence the "SSA Managers Labor Relations Handbook" and questioned Faulkner-Martin about the specific contract language relied upon by the Agency in issuing such a directive:

> Employees shall have the right to direct and fully pursue their private lives, . . . without interference coercion or discrimination at the worksite, and without imposition of discipline or adverse action *unless such pursuit impairs the efficiency of the service.*

(Emphasis added.) Weliver's lawyer did not cross-examine Faulkner-Martin about the handbook.

Weliver testified, on cross-examination, in response to questions about the telephone calls she had made to coworkers: "Who can tell me that I cannot call my coworkers? There's no law that can tell me that I cannot call someone outside of the office." Weliver was directed to read the above-quoted paragraph from the handbook, and was asked what she understood it to mean. She testified that she thought the handbook paragraph did not prohibit friendly telephone calls.

The management directive issued by Jones on December 10, 2003 specifically referred to an employee complaint about a telephone call from Weliver:

> Ms. Faulkner-Martin has also been approached by one of your classmates who complained that you had called her at home after work hours to suggest that her job was in jeopardy. This is clearly not appropriate.

The handbook permits the Agency to discipline employees for off-site behaviors if they "impair[] the efficiency of service." Weliver's call to a classmate at home caused the employee concern and anxiety about her job security and necessitated a meeting with Faulkner-Martin. The management directive was within the authority of the Agency because its purpose was to correct behavior demonstrated to impair workplace efficiency.

Weliver also argues that there was insufficient evidence adduced at the hearing to support a finding that she violated the management directive. She asserts that her classmates voluntarily provided her with their telephone numbers; therefore her calls were invited, and only uninvited telephone calls were a violation of the directive.

There was much testimony about whether Weliver's calls to several classmates were invited. Jones testified that the classmates decided to give Weliver their telephone numbers at the beginning of the training class when Weliver said she would like to socialize with them during the course of the class. According to Jones, the classmates later regretted this decision, because Weliver began calling them at home to discuss her belief that management was harassing her.

Even if we were to accept Weliver's assertion that the directive only prohibited uninvited calls, there is substantial evidence in the agency record to show that Weliver's telephone calls to her classmates were uninvited. Weliver admitted calling one classmate, Bobby Keaton, after the December 2003 management directive.[8] She admitted that

[8] Weliver apparently called Keaton many times at home, but he did not pick up the phone because he recognized her phone number on his

(Continued on following page)

Keaton did not give her his telephone number. In a written statement Keaton submitted to Jones, which was admitted into evidence, he described Weliver's approaching him numerous times during class and accusing him of harassing her, and recounted that Weliver had "told her husband about me and that he was to call me and come see me about her being harassed." Clearly, Keaton did not invite Weliver to call him.

Weliver testified about the reason for her call to Keaton:

> But my reason to call was to confront my co-workers why they threat me, why they were mean to me, why they were doing what they were doing to me. . . .

When a member of the Board panel questioned Weliver about her calls to Keaton, the following ensued:

> [PANEL MEMBER]: When you dialed the number, who were you intending to call?
>
> WELIVER: Mr. Bobby Keaton, and –
>
> [PANEL MEMBER]: Okay. And you had been directed not to call him. Isn't that correct?
>
> WELIVER: Correct.

Caller ID system. Weliver testified that someone answered one of her phone calls to Keaton, but the speaker stated that she had called the wrong number. It is unclear whether the speaker was Keaton. Counsel for Weliver suggested during his direct examination of her that the fact that she did not reach Keaton meant that she did not violate the directive.

The Board's finding that Weliver violated the management directive of December 10, 2003, was supported by this evidence, which was substantial.

B. Refusal to Meet with Donna Jones on March 4, 2004 and Vulgar Conduct During the Meeting

The Proposal to Remove also identified numerous instances of conduct by Weliver that was deemed "conduct unbecoming a Federal employee." One such instance happened on March 4, 2004. In the Proposal to Remove, Jones described the conduct as follows:

> I asked you [referring to Weliver] if I could speak to you in my office before you left for the day. I told you that I needed to discuss with you allegations made by your classmates. I also informed you of your right to have union representation at the meeting. You immediately told me that you were not going to discuss anything with me today or tomorrow. . . . You said that the students' problems with you are my fault. You accused me of influencing them. You then told me that I would pay for everything that I have done to you.
>
> You then blew a kiss as you rose from your chair and walked towards the door. As you were leaving, you made a gesture to me by patting your rear end towards me.

The Board found as a fact that this incident occurred. On appeal, Weliver maintains this finding was in error because Jones was not a credible witness.

Jones's testimony during the hearing before Examiner Steinwedel confirmed this account of the meeting. Jones

further testified that, immediately after the meeting, she reported Weliver's conduct to Faulkner-Martin. Faulkner-Martin also testified about Weliver's conduct at this meeting (apparently based on Jones's report to her). On direct examination before the Board, Weliver denied making the obscene gesture. Weliver was not asked whether she told Jones that she would not meet with her.

Credibility determinations are normally within the discretion of the Board.[9] In its decision, the Board stated:

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[9] This Court has distinguished between "testimonial inferences" based on the demeanor of a witness and "derivative inferences" based upon the evidence itself. *Dep't of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 299-300 (1993); *See also Anderson v. Dep't of Pub. Safety & Corr. Serv's*, 330 Md. 187 (1993) (holding that an ALJ's findings of fact based on demeanor-based credibility assessments should be accorded greater weight by an agency because of the ALJ's unique opportunity to observe the witnesses). A "testimonial inference" can only be drawn by a trier of fact who actually observes the witness because:

> All aspects of the witness's demeanor – including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication – may convince the observing trial judge that the witness is testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript, such as [an agency or reviewing court].

Shrieves, *supra*, 100 Md. App. at 300 (quoting *Penasquitos Vill., Inc. v. Nat'l Labor Relations Board*, 565 F.2d 1074, 1078-79 (9th Cir. 1977)). Whereas inferences drawn from the evidence itself – such as the number of witnesses testifying to the same version of events, the likelihood that one version of events is true based on logic or common sense, or documentary evidence – can be made absent observation of the witnesses.

In the case at bar, two hearings were held: one before Examiner Steinwedel and one before the Board. Because the Board held a continued, rather than *de novo*, hearing, it could only review the

(Continued on following page)

"The Board of Appeals finds the testimony of the [Agency]'s witnesses ... to be more credible than [Weliver]'s testimony." The Board had the opportunity to observe Weliver's testimony and to read the transcript of the testimony of Jones and Faulkner-Martin, which sharply conflicted with it. The Board apparently concluded, based both on its demeanor-based assessment of Weliver and the inferences it chose to draw from the testimony of the Agency's witnesses, that the Agency's version of events was more credible. We will not disturb this finding because it was supported by substantial evidence in the record.

C. Interruption of Training Exercise Graduation Speaker

The Proposal to Remove also alleged that Weliver had interrupted the graduation speaker at an in-office ceremony commemorating the end of the training class. The Board made the following finding in regard to this incident:

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transcript of the testimony of the three witnesses presented at the first hearing – Jones, Faulkner-Martin, and Gartelman. However, unlike in *Shrieves* and *Anderson,* Examiner Steinwedel did not make any findings of fact after the first hearing. Thus, the Board's findings were not in conflict with any previous findings.

While Weliver makes a passing reference in her brief to the inability of the Board to observe the demeanor of the three initial witnesses, she does not argue that the Board was unable to assess credibility. Nevertheless, we are aware of the law and are conscious of the fact that the Board did not observe three of the witnesses in this case and, therefore, could not make demeanor-based credibility assessments. However, because Weliver does not raise this argument on appeal, we will not accord it much weight.

> On March 5, 2004, [Weliver], while attending a graduation ceremony for herself and some of her co-workers, interrupted the speaker and walked out before the ceremony was concluded.

Jones and Faulkner-Martin both testified that the students in the training class were told during class that an in-office staff party and graduation ceremony would be held at 8:00 a.m. on March 5, 2004. At that time, Jim Riley, the Area Director, would hand out certificates to the class members. A second graduation ceremony would be held immediately thereafter, at 8:30 a.m., via teleconference, for all the students across the country who had participated in the same training.

Weliver testified that she was never told about the first ceremony and that an electronic "Daily Reminders List," which appeared on each class members' computer screen, was misleading in that it stated "3/5/04 – Please try real hard to have your food here by 8:00 a.m. The class must attend the 8:30 IVT graduation after words of encouragement from Jim Riley, AD." Weliver thought this notice meant there was no reason to be present until 8:30 a.m.

Jones testified that the students had been advised orally, several times, that there would be an in-office ceremony that would precede the national ceremony. It was not reasonable, then, for Weliver to interpret the electronic reminder as she did. Jones and Faulkner-Martin both pointed out that Weliver was the only student (aside from one student who was ill) who did not arrive on time for the 8 a.m. ceremony.

According to Faulkner-Martin, Weliver arrived in the classroom after the national ceremony was over. In Riley's

written statement, which was admitted into evidence, he stated that Weliver arrived around 9 a.m. Weliver testified that she arrived around 8:35 a.m. All three agree that, when Weliver arrived, the graduation certificates already had been distributed, and Riley was in the middle of making his remarks to the class. According to Jones, Weliver walked to her desk and sat down, but then stood up and said, "Excuse me, Mr. Riley, that's a nice speech that you're giving, but I didn't get my certificate, and I wanted to know why I didn't get my certificate." She then turned and walked out of the classroom. Riley's written statement also confirms that Weliver walked out of the classroom without asking permission.

Weliver testified that, during the ceremony, she raised her hand and asked Riley, "May I impose?" She then asked him why she had not received a certificate and whether she could be excused from class. As Weliver described it, the incident was not disruptive.

Again, conflicting testimony was received in regard to this incident both before the Board and before Examiner Steinwedel. The testimony of Jones and Faulkner-Martin and the written statement of Riley were entirely consistent. Weliver's testimony conflicted with these accounts. Further, according to Riley's written statement, Weliver arrived at 9 a.m., more than thirty minutes beyond the time stated in the Daily Reminders List upon which she claimed to have relied. Even if the Board credited Weliver's testimony that she arrived at 8:35 a.m., she was still admittedly late to the ceremony. The Board reasonably could infer from the evidence presented by the Agency that the interruption of a graduation speaker, no matter how polite the manner, would be inappropriate and disruptive, especially if the student arrived late to the ceremony. There

was substantial evidence in the record to support the Board's finding.

D. Threat to Donna Jones

The Proposal to Remove alleged that Weliver whispered "I am going to kill you" to Jones, after she walked out of the graduation ceremony. The Board found as a fact that Weliver said those words.

Jones testified that Weliver made the death threat in a soft voice, as Jones was walking by her cubicle. Thus, only Jones and Weliver could have heard the alleged threat. Jones testified "there was no mistake in what she was saying." Further, she testified that she immediately informed Faulkner-Martin and Riley of Weliver's threat. Faulkner-Martin confirmed that Jones reported the threat to her and to Riley shortly after Weliver walked out of the graduation ceremony. Weliver denied having threatened Jones. She testified that she would not have made this type of threat because she would not have had the physical strength to carry it out.

Again, the Board was faced with conflicting evidence in the record. Jones testified that the incident occurred; Weliver testified that it did not. Faulkner-Martin testified that Jones reported the incident to her. As discussed earlier, *see supra*, note 10, the Board could not make demeanor-based assessments of the credibility of Jones and Faulkner-Martin. However, the Board did observe Weliver's testimony and could make an assessment of her credibility based on her demeanor. It is clear from the totality of the Board's decision that they did not find Weliver to be a credible witness. Additionally, Jones's immediate report of the alleged threat to Faulkner-Martin

provided corroboration for her version of events. The Board's finding was supported by substantial evidence.

E. Assaults upon Rebecca Gartelman

In the Proposal to Remove, Weliver was accused of assaulting and harassing Rebecca Gartelman, a cleaning woman in her office. The Board made the following findings of fact about these allegations:

> The [Agency] . . . employed an outside contractor, Service Master, to perform their cleaning services. One of Service Master's [sic] employees, Ms. Rebecca Gartelman, worked at the Glen Burnie office performing cleaning duties. On or about March 16, 2004 [Weliver] began to harass Ms. Gartelman. [Weliver] began telling Ms. Gartelman that she was being watched and that she was going to lose her job. [Weliver] attempted to pressure Ms. Gartelman into assisting her in making complaints against the employer. [Weliver] wanted Ms. Gartelman to sign statements attesting to the fact that [Weliver] was being harassed by the employer and her coworkers. Ms. Gartelman declined to get involved. On one occasion [Weliver] pushed Ms. Gartelman into a filing room and told her not to tell anyone what [Weliver] had been saying to her. [Weliver] made threats against Ms. Gartelman and Ms. Gartelman's child. Beginning on March 16, 2004 [sic] [Weliver] made nightly calls to Ms. Gartelman's home, calling her hour after hour until as late as 11:00 p.m.
>
> On March 29, 2004, as Ms. Gartelman was working in one of the building bathrooms, she was approached by [Weliver]. [Weliver] came up behind Ms. Gartelman, as she was cleaning a

> commode, and tried to push her head into the commode. [Weliver] was able to push Ms. Gartelman's head far enough into the commode to cause the ends of her hair to become wet from the water in the commode. While doing this [Weliver] was again telling Ms. Gartelman that if she did not help her, by confirming that [Weliver] was being mistreated on the job, Ms. Gartelman would be hurt in some way.

Three witnesses testified at the hearing before Examiner Steinwedel about these allegations: Gartelman, Jones, and Faulkner-Martin. The Board's findings in effect adopted Gartelman's testimony about what had transpired. Both Jones and Faulkner-Martin testified about two meetings in which Gartelman had told them about Weliver's threats and assaults.[10] Faulkner-Martin described Gartelman's demeanor during these meetings as "hysterical. She was crying. She was very upset. She was shaking." Jones testified that Gartelman was extremely emotional.

Weliver testified that none of these incidents happened. She pointed out that, if the assault in the bathroom had taken place as Gartelman described it – with the bathroom door open – workers in nearby offices would

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[10] Gartelman initially approached Jones on March 30, 2004 (after the first Proposal to Remove dated March 24, 2004, had been issued), and told her that she was having problems with W liver. Jones took Gartelman to Faulkner-Martin's office, where Gartelman recounted the alleged assault in the file room and other harassment by Weliver.

Apparently, Gartelman returned to Jones and Faulkner-Martin the next day and said she had not told them about another incident because she was too embarrassed about it. She then told about the incident when Weliver pushed her head into a toilet.

have heard the commotion.[11] Finally, she claimed to have had a cordial relationship with Gartelman, so much so that Gartelman even had left her a note on one occasion asking her to call her at home with regard to comments Faulkner-Martin had made behind Weliver's back.[12]

During Weliver's testimony about the day she learned about Gartelman's allegations, the following ensued:

> WELIVER: . . . I discussed with [my lawyer] that we must start an investigation. And I found out that this woman [referring to Gartelman] has an – criminal records [sic].
>
> [AGENCY COUNSEL]: Objection, Your Honor.
>
> [BOARD MEMBER]: Sustained

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[11] The Board denied Weliver's request to introduce into evidence a report by a private investigator describing the foot traffic in the area of the bathroom at the time of the alleged assault. The Board reasoned that the report was not relevant because it was made almost a year after the alleged assault and was based on only a few observations of the area.

[12] Weliver's counsel obtained a handwriting expert to analyze Gartelman's handwritten note against known samples of her handwriting. The expert concluded that Gartelman wrote the note to Weliver. However, the analysis was completed weeks after the first hearing before Examiner Steinwedel ended and Gartelman's testimony had long since been concluded. Gartelman denied writing the note at the first hearing.

At the continued hearing, the Board denied counsel's request to introduce the handwriting expert's affidavit into evidence because the samples of Gartelman's handwriting had not been identified and introduced into evidence during the prior hearing. (Additionally, the original note was not presented at either hearing and there was some question about the authenticity of the photocopy.) Weliver's counsel objected to the exclusion of the report. The Board overruled the objection, but admitted the report for the purposes of identification on appeal.

> WELIVER: I found out that she is –
>
> [WELIVER'S COUNSEL]: All right. Let me ask -
>
> WELIVER: No, I must say it, Mr. Eigles [referring to her attorney].
>
> [WELIVER'S COUNSEL]: All right.
>
> WELIVER: Please, I want, I want to tell them.
>
> [WELIVER'S COUNSEL]: All right.
>
> WELIVER: Then we found out that they want to kill me.

Weliver's counsel moved on to other matters after this exchange.

The Board did not credit much of Weliver's testimony during the hearing, including her denial of Gartelman's accusations. They observed her demeanor and heard her version of the events. Her testimony suggested a belief that the entire staff of the Agency, as well as contractual cleaning and security personnel, were conspiring against her. The Agency, in its closing argument, stated: "You should now understand that Ms. Weliver has grand conspiracy theories. She believed everyone was harassing her. She testified that everyone was lying about her." The testimony of Gartelman, while not made in the presence of the Board, was corroborated and documented by two other witnesses, Faulkner-Martin and Jones. In considering the evidence as a whole, the Board could reasonably infer that Gartelman was telling the truth. Therefore, substantial evidence in the record supported the Board's findings.

F. Reason for Rescission of Initial Proposal for Removal

Lastly, Weliver challenges the Board's finding that the reason Jones rescinded the first Proposal to Remove (dated March 24, 2004) and issued the superceding Proposal to Remove (dated April 2, 2004) was because she learned of the assaults upon Gartelman in the intervening days.

Weliver argues that Faulkner-Martin and Jones coerced Gartelman into making false statements against her in order to bolster the Proposal to Remove. Weliver provides no support for these allegations in her brief and none was found in the record.

We have previously found substantial evidence supported the Board's findings that the assaults occurred. We similarly find substantial evidence in the record to support the Board's finding that the second Proposal to Remove was issued in response to Gartelman's allegations.

II.

Weliver contends that she was denied due process of law at the January 11, 2005 hearing before Examiner Steinwedel.[13] She offers numerous reasons in support, none of which are persuasive.

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[13] As discussed, *supra*, Weliver moved for a *de novo* hearing following the January 11, 2005 hearing. Examiner Steinwedel removed the case to the Board of Appeals and the Board denied Weliver's request for a de *novo* hearing, holding a continued hearing instead. Weliver had already been granted a *de novo* hearing after her first hearing before Examiner Sapp was continued due to her counsel becoming ill.

We begin by noting that, in a hearing before an administrative agency, the hearing examiner is not bound by the rules of evidence or the procedures followed in a court of law. *See* LE 58-506(a)(2) (describing procedures before the Board of Appeals). The hearing examiner may "admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their, affairs and give probative effect to that evidence." Md. Code (2004 Repl. Vol.), State Government Article ("SG") § 10-213(b). "[W]hile administrative agencies are not constrained by technical rules of evidence, they must observe basic rules of fairness as to the parties appearing before them so as to comport with the requirements of procedural due process afforded by the Fourteenth Amendment." *Travers v. Baltimore Police Dep't*, 115 Md.App. 395, 411 (1997).

Weliver initially argues that the Agency was allowed to offer "post hoc rationalizations" for terminating her during the hearing. She asserts that "[p]ost hoc rationalizations are foreclosed when reviewing an agency determination whether by, counsel, administrative appellate body or reviewing court." Specifically, she complains that Agency witnesses were allowed to testify about her extensive history of disciplinary problems with the Agency and were not constrained by the hearing examiner to testify only about the specific allegations against her in the Proposal to Remove.

The authority Weliver cites for the proposition that "post hoc rationalizations" are impermissible at an administrative

hearing does not support her argument.[14] Moreover, the testimony Weliver complains about concerned her conduct during the training class, not prior instances of misconduct. Weliver's improper conduct during the training class was specifically addressed by Jones in the "Proposal to Remove":

> It is also noted that you [referring to Weliver] harassed and intimidated other students while in class. You complained to employees about management discriminating against you. Another employee said that you accused him of harassing

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[14] "Two of the cases cited by Weliver in her brief, *Board of Educ. of Montgomery County v. Paynter*, 303 Md. 22 (1985) and *N. L. R. B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965) concern the role of an appellate court reviewing an agency decision. Paynter states that a circuit court may not search the record and find "post hoc rationalizations" for an agency decision, but rather must rely on the agency's findings of fact when acting as a reviewing court. *Paynter*, *supra*, 303 Md. at 41. The Supreme Court decision in *Metropolitan Life* similarly states that an agency may not argue on appeal new reasons why an agency determination was made when those reasons are not apparent from the agency decision at the administrative level. *Metropolitan Life Ins. Co.*, *supra*, 380 U.S. at 442-44. Neither of these decisions place any restrictions on the hearing examiner at an administrative hearing.

Weliver also cites *Maryland Shipbuilding & Drydock Co., Inc. v. Maryland Com'n on Human Relations*, 70 Md. App. 538 (1987) ("*Maryland Shipbuilding*"). In *Maryland Shipbuilding*, this Court affirmed the decision of the Commission on Human Relations, finding that an employee was denied a promotion for discriminatory reasons. In discussing findings of fact made by the hearing examiner, this Court stated that they agreed with the examiner that evidence offered during the hearing by the employer had "the appearance of a *post hoc* rationalization." *Id.* at 552. Contrary to Weliver's argument, this case does not prohibit the use of "post hoc rationalizations" during administrative hearings. Rather, this Court was merely noting that the hearing examiner made an appropriate credibility determination when assessing the employer's reasons for terminating the employee.

> you and that his name was on your list of people to sue.

The Hearing Examiner properly allowed testimony by Agency witnesses that was relevant to the issue of Weliver's termination.

Weliver next argues that the hearing examiner failed to control Agency witnesses during cross-examination and allowed them to digress during their answers. Again, our review of the record finds no evidence of any due process violations.[15]

The next error asserted by Weliver concerns the examiner's decision to allow the Agency to question its witnesses about a multitude of documents on direct examination, before, they were formally moved into evidence. Counsel for the Agency was allowed to wait until the end of each witness' testimony to identify and submit all of the documents sequentially.

Weliver does not explain how this procedure violated her right to due process of law. Weliver had previously been given copies of all of the documents that the Agency introduced. Furthermore, the documents were introduced into evidence prior to her cross-examination of the Agency witnesses. As previously discussed, administrative hearings may be conducted informally and the examiner is not bound by the rules of evidence and procedure followed in a

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[15] We note that counsel for Weliver was admonished numerous times for making arguments and failing to ask questions during cross examination. The hearing examiner thus allowed all the witnesses considerable leeway in attempting to answer the questions posed by counsel.

court of law. *See* COMAR 09.32.06.02. We find no due process violation in this practice.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

APPENDIX B

Fatima G. Weliver	*	In the
Appellant	*	COURT OF SPECIAL APPEALS
vs.	*	
Department of Labor, Licensing and Regulation	*	No. 20
Appellee	*	September Term, 2006

ORDER

Upon consideration of Appellant's Motion for Reconsideration of the Court's reported opinion filed on November 3, 2006, it is this 21st day of December, 2006, by the Court of Special Appeals,

ORDERED that Appellant's Motion for Reconsideration is denied.

For a Panel of the Court

(CHIEF JUDGES SIGNATURE
APPEARS ON ORIGINAL ORDER)
CHIEF JUDGE

APPENDIX C

Fatima G. Weliver Petitioner	*	IN THE
	*	CIRCUIT COURT
v.	*	FOR
Social Security Administration, and	*	ANNE ARUNDEL COUNTY
Board of Appeals, Dep't of Labor, Licensing and Regulation	*	Case No.: C-2000-69271
Respondents	*	

* * * * *

MEMORANDUM OPINION AND ORDER

On February 27, 2006, the Court heard oral arguments in a record appeal of this matter from the Board of Appeals, Department of Labor, Licensing and Regulation. The Court held the matter under advisement.

BACKGROUND

This is an Appeal from the Board of Appeals, Department of Labor, Licensing and Regulation's ("DLLR") decision, which affirmed the decision of the DLLR Claim Specialist finding that Petitioner had been discharged from her employment for gross misconduct within the meaning of MD. CODE ANN., LABOR AND EMPLOYMENT §8-1002. Gross misconduct is defined as a "deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interest of the employing unit." MD. CODE ANN., LABOR AND EMPLOYMENT §8-1002. Gross misconduct is grounds for denying unemployment benefits.

The Social Security Administration employed the Petitioner, Ms. Weliver, as a Social Insurance Specialist. Ms. Weliver's last day of work was March 29, 2004. She was later discharged for her failure to follow a management directive directing Petitioner to refrain from calling co-workers after work hours and for actions that were unbecoming of a federal employee. Petitioner's actions included a few alleged assaults.

Petitioner subsequently filed for unemployment benefits. However, the DLLR Claims Specialist found that the claimant's actions constituted "gross misconduct" pursuant to § 8-1002. Therefore, she was denied unemployment benefits. Petitioner appealed the decision.

After several failed attempts to hold a hearing, on January 11, 2005, a hearing took place before a DLLR Hearing Specialist. Due to time constraints, the hearing was scheduled to continue on a later date. The Board of Appeals assumed jurisdiction of the case to continue the hearing. The Board ruled that the testimony and evidence from the January 11, 2005, hearing were to be considered evidence before the Board.

The Board of Appeals upheld the DLLR Claims Specialist's finding.

This appeal followed.

STANDARD OF REVIEW

Judicial review of the administrative adjudication of unemployment insurance appeals is governed by MD. CODE ANN., STATE GOV'T §8-512. "Findings of fact of the Board of Appeals are conclusive and the jurisdiction of the court is confined to questions of law if: (a) findings of fact

are supported by evidence that is competent, material, and substantial in view of the entire record; and (2) there is no fraud." *See* §8-512(d).

Findings of fact made by the Board are binding upon this court if there is substantial evidence in the record to support them. The Circuit Court must uphold an order of an administrative agency if it is not based upon an erroneous determination of law and if the agency's conclusions reasonably may be based upon facts proven. *Montgomery County v. Buckman,* 333 Md. 516, 519 (1994).

DISCUSSION

At the Board of Appeals hearing, both Ms. Weliver and the employer had equal opportunity to present testimony and evidence concerning the circumstances of Ms. Weliver's dismissal. At the conclusion of the hearing, the Board held that the employer's testimony and evidence concerning the dismissal was more credible than the evidence provided by Ms. Weliver.

This Court must decide whether there was enough substantial evidence presented at the hearing to support the Board of Appeals decision that "[t]he overwhelming weight of the credible evidence supports a finding that the claimant was discharged for gross misconduct within the meaning of Section 8-1002."

The Court finds that there is substantial evidence in the record to support the Board's finding that Ms. Weliver was discharged for "gross misconduct." The record indicated that there were several instances of Ms. Weliver violating am employer's directive to refrain from calling co-workers after hours. It contained evidence that Ms.

Weliver threatened co-workers, made obscene gestures, and even physically attacked a co-worker by forcing her head into a toilet.

The preceding examples of Ms. Weliver's conduct clearly amount to substantial evidence that a reasonable person could rely upon to find her guilty of gross misconduct. Since this Court cannot substitute its own judgment in light of the facts, it must uphold the Board of Appeals findings. Therefore, this Court finds that the Board of Appeals did not err in its decision.

CONCLUSION

For the above-stated reasons, the Court AFFIRMS the decision of the Board of Appeals in this matter and will enter the Order attached hereto.

/s/ Paul F. Harris, Jr.
PAUL F. HARRIS, JR., JUDGE

ORDER

Upon consideration of the Petitioner's Petition for Judicial Review heard before this Court on February 27, 2006, it is this 3 day of March 2006, ORDERED that the decision of the Board of Appeals be AFFIRMED.

/s/ Paul F. Harris, Jr.
PAUL F. HARRIS, JR., JUDGE

APPENDIX D

DLLK
STATE OF MARYLAND
DEPARTMENT OF LABOR,
LICENSING AND REGULATION

JAMES D. FIELDER, Jr., Ph.D.,
Secretary

Board of Appeals
Donna Watts-Lamont,
Chairperson

-DECISION-

Claimant:

FATIMA G WELIVER
713 CLAREMONT DR.
LAFAYETTE, IN 47905

Employer:

SOCIAL SECURITY
ADMINISTRATION
UC EXPRESS
P.O. BOX 66945
ST. MO 63166-6945

Decision No.: 1875-BH-05

Date: September 2, 2005

Appeal No.: 0418815

S.S. No.: 16-66-5565

L.O. No.: 63

Appellant: Board of
Assumed Jurisdiction

Issue: Whether the claimant was discharged for misconduct or gross misconduct connected with the work within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 8-1002 or 1003.

Whether the claimant was discharged for aggravated misconduct connected with the work within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 1002.1.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the

appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200.*

The period for filing an appeal expires: October 1, 2005

- APPEARANCES -

FOR THE CLAIMANT:
Henry Eigles, Esquire
Fatima G. Wiliver
Dr. Betsy Crozier
Rebecca Gartelman
1100 N. EUTAW STREET
ROOM 515
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FOR THE EMPLOYER:
Taryn Jasner, Esquire
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Linda Faulkner-Martin
Donna Jones
410-767-2781
FAX 410-767-2787
TTY USERS, CALL VIA
THE MARYLAND RELAY
SERVICE

[LOGO]
Keeping Maryland Working and Safe

Ina Pippin
Robert Keaton
Theodore Taylor
Nita R. Alba, Union Representative
Emma L. Elder, Union Representative

PRELIMINARY STATEMENT

This case was originally scheduled for a hearing on August 30, 2004. The claimant's attorney, Mr. Henry Eigles, requested and was granted a postponement. The case was next scheduled for September 10, 2004. The case was again postponement [sic] at the request of the Employer's Representative and re-scheduled for September 16, 2004. On September 7, 2004 this matter was again postponed, pursuant to a request from the claimant's attorney, as that

date conflicted with the Jewish holiday of Rosh Hashanah. The hearing was then set for October 1, 2004.

The first hearing in this matter finally began on October 1, 2004. However the claimant's attorney became ill during the course of the hearing. The Hearing Examiner stopped the proceedings and it was agreed that the hearing would be continued to another day. Before this matter could be re-scheduled for the continued hearing the claimant's attorney requested and was granted a *de novo* hearing. The new hearing was scheduled for November 15, 2004, before Chief Hearing Examiner Louis Steinwedel. Unfortunately none of the employer's witnesses were available on November 15th and this case again had to be postponed. The new hearing date was set for December 7, 2004. On the weekend preceding December 7, the employer's counsel, Rafael Melendez was involved in a motorcycle accident. This resulted in the case being postponed until January 11, 2005.

On January 11, 2005 the *de novo* hearing in this matter began with Chief Hearing Examiner Steinwedel presiding. Testimony was presented from two witnesses for the employer, Linda F. Martin and Donna Jones. The claimant's witness, Rebecca Gartelman, was allowed to testify out of order. Following Ms. Gartelman's testimony the hearing was concluded for the day with a future date to be set for additional testimony.

On February 18, 2005, the claimant's attorney filed a Motion for New De Novo Hearing To Provide Due Process of Law. Chief Hearing Examiner Steinwedel ruled that the allegations raised in the motion were without merit and were rejected. However due to the nature of the allegations and the possible perception of bias, and in consultation with the Board of Appeals, the case was removed to the Board of Appeals.

The Board of Appeals took jurisdiction of this case on April 11, 2005. In response to the employer's Motion to Limit Evidence and Testimony and the claimant's response to that motion, the Board of Appeals had an official transcript, of the hearing held on January 11, 2005, prepared. After reviewing the entire record and history of this case the Board of Appeals ordered the following on May 12, 2005:

1. All testimony and documents entered into evidence at the hearing held on January 11, 2005 before Chief Hearing Examiner Louis Wm. Steinwedel are in evidence before the Board of Appeals and no additional testimony is needed from the witnesses having already testified.

2. The Board of Appeals shall conduct a continued hearing on this matter on June 2, 2005, beginning at 9:30 a.m.

3. The following individuals shall be subpoenaed to testify on June 2, 2005:

Theodore Taylor	(9:30)
Ina Pippin	(9:30)
Suzy Solis	(9:30)
Monique Hawley	(9:30)
Robert Keaton	(9:30)
James Riley	(9:30)
Pilar Rhodes	(1:30)
Lawrence W. Rhodes	(1:30)
Brenda Van Bergen	(1:30)
Emma Elder	(1:30)
Nita Alba	(1:30)

4. At the conclusion of the hearing on June 2, 2005 the Board of Appeals will determine whether or

not to schedule additional time to hear further testimony.

5. The Agency's request to participate via telephone is denied.

The hearing before the Board of Appeals was held and concluded on June 6, 2005.

EVALUATION OF EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor Licensing and Regulation's documents in the appeal file.

The Board of Appeals finds the testimony of the employer's witnesses and the claimant's witness, Rebecca Gartelman to be more credible than the claimant's testimony. The overwhelming weight of the credible evidence supports a finding that the claimant was discharged for gross misconduct within the meaning of Section 8-1002.

FINDINGS OF FACT

The claimant was employed as a Social Insurance Specialist (Claims Representative) with the Social Security Administration. The claimant's last day of work with this employer was March 29, 2004. The claimant became separated from employment as a result of a discharge.

The claimant was discharged for failure to follow a management directive and for conduct unbecoming a federal employee. Specifically the claimant violated a management directive, issued to her orally and in writing on

December 10, 2003. The directive ordered the claimant to refrain from calling co-workers at their homes. This directive was issued by the employer in response to complaints they had received from co-workers regarding the claimant's harassment of them. The claimant violated this directive when she made phone calls to three co-workers homes during the evening hours of March 4, 2004. The claimant called one co-worker, and proceeded to scream at and accuse the co-worker of harassing her. The claimant called another co-worker and after receiving no initial answer repeatedly called the co-worker's home telephone number approximately every fifteen minutes from 5:30 to 8:30 p.m. The claimant admitted calling her co-workers in violation of the management directive.

On March 4, 2005 [sic], the claimant was asked by her supervisor, Donna Jones, to meet with her in her office. Ms. Jones informed the claimant that there were certain allegations from her co-workers that needed to be discussed. The claimant refused to meet with Ms. Jones and proceeded to make threats against Ms. Jones and her co-workers. The claimant then rose from her chair, blew a kiss and walked towards the door. As the claimant was leaving she patted her behind towards Ms. Jones.

On March 5, 2004, the claimant, while attending a graduation ceremony for herself and some of her co-workers, interrupted the speaker and walked out before the ceremony was concluded. Later that day the claimant stated to Ms. Jones. "I am going to kill you."

The Social Security Administration office in Glen Burnie, Maryland employed an outside contractor, Service Masters, to perform their cleaning services. One of Service Master's employees, Ms. Rebecca Gartelman, worked at

the Glen Burnie office performing cleaning duties. On or about March 16, 2004 the claimant began to harass Ms. Gartelman. The claimant began telling Ms. Gartelman that she was being watched and that she was going to lose her job. The claimant attempted to pressure Ms. Gartelman into assisting her in making complaints against the employer. The claimant wanted Ms. Gartelman to sign statements attesting to the fact that the claimant was being harassed by the employer and her co-workers. Ms. Gartelman declined to get involved. On one occasion the claimant pushed Ms. Gartelman into a filing room and told her not to tell anyone what the claimant had been saying to her. The claimant made threats against Ms. Gartelman and Ms. Gartelman's child. Beginning on March 16, 2004 the claimant made nightly calls to Ms. Gartelman's home, calling her hour after hour until as late as 11:00 p.m.

On March 29, 2004, as Ms. Gartelman was working in one of the building bathrooms, she was approached by the claimant. The claimant came up behind Ms. Gartelman, as she was cleaning a commode, and tried to push her head into the commode. The claimant was able to push Ms. Gartelman's head far enough into the commode to cause the ends of her hair to become wet from the water in the commode. While doing this the claimant was again telling Ms. Gartelman that if she did not help her, by confirming that the claimant was being mistreated on the job, Ms. Gartelman would be hurt in some way.

Prior to learning about the claimant's actions against Ms. Gartelman, the employer had issued a proposal for the claimant's removal from her position. After learning of the claimant's actions towards Ms. Gartelman, that proposal was withdrawn and a new proposal for removal was issued

on April 2, 2004. The claimant was immediately discharged by the employer.

CONCLUSIONS OF LAW

Section 8-1002 of the Labor and Employment Article defines gross misconduct as conduct of an employee that is a deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit or repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

In a case of a discharge the burden is on the employer to prove, by a preponderance of credible evidence, that the claimant was discharged for actions that rose to the level of gross misconduct within the meaning of Section 8-1002 of the Labor and Employment Article. The employer has met its burden in this case.

Many of the claimant's co-workers complained to the employer regarding the claimant's annoying and harassing telephone calls to their homes. The claimant's behavior necessitated the employer issuing a management directive to her to refrain from calling her co-workers at their homes. The claimant failed to comply with the employer's directive. Instead she continued to make these calls. The claimant also refused to meet with her supervisor when reasonably requested to do so.

The claimant went beyond just her co-workers in her continuing harassment of individuals. The claimant began a campaign to get a contractual worker, Ms. Rebecca Gartelman, to assist her in her complaints against the

employer. In an act which by itself would constitute gross misconduct within the meaning of Section 8-1002, the claimant attacked Ms. Gartelman and attempted to push her head into a commode.

The claimant was discharged for her actions.

DECISION

It is held that the claimant was discharged for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002. The claimant is disqualified from receiving benefits from the week beginning March 28, 2004 and until the claimant becomes re-employed, earns at least twenty times her weekly benefit amount and thereafter becomes unemployed, through no fault of her own.

The decision of the Claims Specialist is affirmed.

/s/ Donna Watts-Lamont
Donna Watts-Lamont, Chairperson

/s/ Clayton A. Mitchell, Sr.
Clayton A. Mitchell, Sr., Associate Member

/s/ Francis E. Sliwka, Jr.
Francis E. Sliwka, Jr., Associate Member

Date of hearing: June 02, 2005
Copies mailed to:
FATIMA G. WELIVER
SOCIAL SECURITY ADMINISTRATION
HENRY EIGLES ATTY. AT LAW
TARYN F. JASNER ESQ.
Michael Taylor, Agency Representative

APPENDIX E

FATIMA G. WELIVER	* **IN THE**
v.	* **COURT OF APPEALS**
BOARD OF APPEALS, DEPARTMENT OF LABOR LICENSING AND REGULATION, et al.	* **OF MARYLAND** * **Petition Docket No. 557 September Term, 2006** * **(No. 20, Sept. Term, 2006 Court of Special Appeals)**

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: March 16, 2007

APPENDIX F

FATIMA G. WELIVER	* **IN THE**
v.	* **COURT OF APPEALS**
BOARD OF APPEALS, DEPARTMENT OF LABOR, LICENSING AND REGULATION, et al.	* **MARYLAND**
	* **Petition Docket No. 557 September Term, 2006**
	* **(No. 20, Sept. Term, 2006 Court of Special Appeals)**

ORDER

The Court having considered the motion for reconsideration filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the motion for reconsideration be, and it is hereby, denied.

/s/ Robert M. Bell
Chief Judge

DATE: June 8, 2007

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(2)

No. 07-292

FILED
NOV 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

FATIMA G. WELIVER,

Petitioner,

v.

BOARD OF APPEALS, DEPARTMENT OF LABOR, LICENSING AND REGULATION OF MARYLAND and U.S. SOCIAL SECURITY ADMINISTRATION,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Special Appeals Of Maryland

PETITION FOR REHEARING DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Fatima G. Weliver hereby petitions for rehearing of the Court's order denying her petition for writ of certiorari on October 15, 2007.

GROUNDS FOR PETITION

The grounds for this petition are that the Court of Special Appeals of Maryland ("CSA"), when reviewing the factual findings of the Board of Appeals of the Maryland Department of Labor, Licensing and Regulation ("Board of Appeals") under the substantial evidence standard of review, engaged in *de novo* evaluation of the evidence of record.

The CSA thus sought to provide an analysis of and resolve conflicts in the evidence of record inasmuch as the Board of Appeals had not provided an analysis and evaluated the conflicting evidence, nor referred to any evidence of record to support its findings of fact. Such procedure is wholly at variance and has been proscribed by prior decisions of the Court. This petition is to request the Court to vacate the CSA's judgment and remand this case back to the CSA for further proceedings in conformity with the Court's decisions.

DISCUSSION

With reference to the evidence of record, the Board merely stated in toto: "The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing [hearings by the hearing examiner and the Board]. The Board has considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file" and that it "finds the testimony of the employer's witnesses and the claimant's witness, Rebecca Gartelman to be more credible than the claimant's testimony." (App. 39)

When issuing its findings of fact the Board thus had not discussed and evaluated the evidence of record: documentary and/or conflicting testimony *Id.*[1] *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-443 (1965) (The Board must "disclose the basis of its order.") Consequently, the Board of Appeals has presented no evidentiary basis for its findings of fact other than to repeat the charges made by SSA in removing Petitioner from her employment. (E. 176)

When reviewing the Board's decision, the CSA began by "deciding whether there is substantial

---

[1] This is aside from the Board failing to make demeanor based assessments of credibility of SSA's witnesses and Rebecca Gartelman when not holding a *de novo* hearing, instead premising credibility of these witnesses on transcript testimony before the hearing examiner. *Cf. Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

evidence in the agency record to support the factual findings that Weliver challenges." (App. 9) Upon the Board's failure to evaluate the evidence of record on which to base its factual findings, the CSA continued by performing that function in place of the Board. To the contrary, the Court's precedents clearly hold that a reviewing court's function is to determine whether the *evidence upon which the agency bases its findings of fact constitutes substantial evidence*, rather than evaluating the evidence *de novo* to support the agency's findings of fact. A reviewing court is not the trier of fact.

Referring to the seminal case of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), holding that the trier of fact must evaluate the evidence of record and that the reviewing court may not substitute its own evaluation of the evidence *de novo*, the Court stated in *NLRB v. Walton Manufacturing Co. et al.* 369 U.S. 404, 405 (1962) that

> We [in *Univeral Camera Corp.*] said that while the "reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view," it may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Id.*, at 488.

Discussion below parallels the opinion of the CSA as it evaluates the evidence of record relating to the Board of Appeals' findings of fact.

A. Violation of Management Directive

With regard to Petitioner violating a management directive proscribing calling co-workers after work hours, the CSA evaluates evidence of record including the "SSA Management Labor Relations Handbook." (App. 11) The Board did not refer to and evaluate this document. (App. 39-40) But even as the CSA evaluates the Handbook, it disregards the Handbook's provision that disciplinary authority of the employer agency is permitted respecting employee conduct only "*at the worksite.*" (Emphasis added.) (App. 11)

B. Refusal to Meet with Donna Jones on March 4, 2004 and Vulgar Conduct During the Meeting

Respecting the Donna Jones charge that Petitioner refused to meet with her on March 4, 2004 and exhibited vulgar conduct (App. 14), the CSA stated that the "Board found as a fact that this incident occurred." The CSA further observed that "Jones's testimony during the hearing before Examiner Steinwedel confirmed this account of the meeting." *Id.*

First, the Board of Appeals did not discuss Jones's testimony to establish the "fact that this incident occurred." (App. 40) Secondly, the CSA

accepts the Board's asserted reliance on credibility of Jones's testimony notwithstanding that the Board did not observe Jones's testimony to make a demeanor based assessment of her credibility and two other witnesses. Contrarily, the CSA, in an extensive note (App. 15, note 9), recognized that "In the case at bar, two hearings were held: one before Examiner Steinwedel and one before the Board. Because the Board held a continued, rather than a *de novo* hearing, it could only review the transcript of the testimony of the three witnesses presented at the first hearing – Jones, Faulkner-Martin, and Gartelman," and thus could not make a demeanor based assessment of their credibility.

C. Interruption of Training Exercise Graduation Speaker

The CSA engaged in extensive discussion when evaluating evidence of record *de novo* regarding interruption of training exercise graduation speaker – to provide that which the Board failed to do. (App. 16) In juxtaposition, in the absence of the Board's analysis or reference to evidence of record, the CSA correctly noted the Board's only statement respecting this matter: "On March 5, 2004, the claimant, while attending a graduation ceremony for herself and some of her co-workers interrupted the speaker and walked out before the ceremony was concluded." (App. 17, 40) (This finding of the Board, moreover, does not address SSA's charge respecting interruption of the graduation speaker as a basis for removal.

"Such behavior wr not only disrespectful, it was disruptive." (E. 177))

D. Threat to Donna Jones

The CSA states that the "Board found as fact" that Petitioner uttered the words to Jones "I am going to kill you." (App. 19, 40) The Board's finding is based on nothing, devoid of any reference to evidence of record and, as such, containing no evaluation of conflicting evidence as engaged in by the CSA. The CSA sought to fill the void and underpin such finding of fact by reference to Jones's testimony, confirmed by Faulkner-Martin, before the hearing examiner (App. 19) – even as the CSA had determined that Jones and Faulkner-Martin had not testified before the Board for it to make a demeanor based assessment of their credibility. *Id.*

E. Assaults on Rebecca Gartelman

The CSA sets out the Board of Appeal's findings of fact of assaults on Rebecca Gartelman that the Board attributes to Petitioner. (App. 20) The Board, however, did not refer to any evidence nor engage in an evaluation of evidence of record to support these findings. (App. 40-41)

The CSA thereupon discusses the testimony of Gartelman, Jones and Faulkner-Martin before the hearing examiner in that the testimony of Gartelman is corroborated by Jones and Faulkner-Martin. (App.

23) The CSA contrasts Petitioner's conflicting testimony before the Board to again fill the evidentiary void of the Board. (App. 21) As discussed, *supra*, these witnesses had not testified before the Board, and a demeanor based credibility assessment of their testimony could not be made by the Board.

Petitioner testified before the Board that "if the assault in the bathroom had taken place as Gartelman described it – with the bathroom door open – workers in nearby offices would have heard the commotion," and she "claimed to have had a cordial relationship with Gartelman, so much so that Gartelman even left a note on one occasion asking her to call her at home with regard to comments Faulkner-Martin had made behind Weliver's back." (App. 21-22)

The CSA also notes (App. 22, note 11) that "The Board denied Weliver's request to introduce into evidence a report by a private investigator describing the foot traffic in the area of the bathroom at the time of the alleged assault." And, too, the CSA notes (App. 22, note 12) that "Weliver's counsel obtained a handwriting expert to analyze Gartelman's handwritten note against known samples of her handwriting. The expert concluded that Gartelman wrote the note to Weliver. * * * Gartelman denied writing the note at the first hearing."

Inasmuch as the Board did not evaluate the evidence of record, the CSA on a *de novo* basis improperly concluded that "In considering the evidence

as a whole, the Board could reasonably infer that Gartelman was telling the truth." (App. 23)

F. Reason for Recission of Initial Proposal for Removal

Without reference to evidence of record, the Board of Appeals finding is that "After learning of [Petitioner's] actions towards Ms. Gartelman, that proposal was withdrawn and a new proposal was issued on April 2, 2004." (App. 41-42)

The CSA states that no support was found in the record for Petitioner's contention "that Faulkner-Martin and Jones coerced Gartelman into making false statements against her in order to bolster the Proposal to Remove," respecting the reason for rescission of the initial proposal for removal (dated March 24, 2004) and replacement by the second proposal for removal (dated April 2, 2004). (App. 24)

The April 2, 2004 proposal to remove was issued after Petitioner's counsel, during the morning of April 1, 2004, conducted a telephone interview with Gartelman when she revealed orchestrated harassment of Petitioner by Faulkner-Martin, manager of Petitioner's Social Security Office (E. 208): security guard, not an office employee, was instructed to monitor and harass Petitioner, and the entire office staff was engaged in harassing Petitioner – doing Faulkner-Martin's bidding so not to suffer retribution, as Petitioner testified regarding her telephone call with Susie. (E. 42-43)

As Gartelman's shift in the Social Security building began 3:30 p.m. (E. 307), she then had opportunity to discuss counsel's interview with Faulkner-Martin and Jones that same day. The next day, April 2, 2004, the second proposal to remove followed. Inasmuch as the security guard was under Faulkner-Martin's control, it is reasonable to infer that upon learning of counsel's interview with Gartelman disclosing to him Faulkner-Martin's harassment of Petitioner, Gartelman, a cleaning maintenance worker, was also subject to her control in signing the backdated March 30, 2004 statement (Appellee Append. 118, E. 216); and the statement dated April 1, 2004 containing the toilet bowl allegations *and* a false recounting of counsel's telephone interview with her. (Appellee Append. 117, E. 217)

The men's restroom where the alleged toilet bowl assault occurred with the door open, on March 29, 2004, is located off the public lobby of the building where the employees and others exit the building. When questioning personnel of offices off the lobby who worked there at the time of the alleged incident, and from his own later observations, the private investigator ascertained that employees commonly leave the building at 5:30 p.m. and that "The foot traffic was in fact heavy around the men's room in the lobby from people in the building departing their jobs." (E. 193)

Petitioner testified that on March 29, 2004, her last day at work and the day of the alleged toilet bowl assault, Jones left the office together with her and

Pilar and LuAnne, other employees, and that was at 5:30 p.m. at the end of the work day. (E. 56) Jones could well have recalled three days later, April 1, 2004, that upon exiting the building lobby Gartelman was cleaning the men's restroom off the lobby at that time.

In her statement dated *March 30, 2004* (Appellee App. 218, E. 216), Gartelman claims assaults by Petitioner as having *occurred on March 16, 2004* (14 days earlier) and that to "make matters worse, *she has called my home endlessly every night since March 16 starting at 6:30 p.m.* She calls at least once every half hour and does not stop until 11:00 p.m. I am very afraid of her."[2] (Emphasis added.) That such statement is false, and the alleged assaults on March 16, 2004, is revealed by Gartelman's very friendly note about Faulkner-Martin's tirade regarding Petitioner and her lawyer, *given to Petitioner on March 24, 2004* (8 days later) – *and containing her telephone number.* (E. 215)

Absent coercion, Gartelman's false statements are inexplicable: as to counsel's telephone interview of

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[2] This is the same pattern of false allegations of incessant evening telephoning to Bobby Keaton attributed to Petitioner. (E. 327) Keaton was part of the harassing cabal under Faulkner-Martin's control.

> And he told me that I was finished, that I said what do you mean? *We don't want you. You're not part of this.* So he was in control of Ms. Martin to put me down." [Emphasis added.] [E. 43]

April 1, 2004; false statements of assaults on March 16, 2004 and Petitioner's incessant telephoning; and, clearly false statements of the toilet bowl incident on March 29, 2004, discerned both from the investigative report and as observed from Gartelman's own testimony. That Gartelman has weak character to succumb to such coercion by Faulkner-Martin has been demonstrated by her perjurious testimony before the hearing examiner: her nursing education and employment background in addition to the restroom assault charge against Petitioner (as found by the private investigator); and denial that she wrote the March 24, 2004 note to Petitioner. Further, she is a convicted felon with an extensive criminal record.

The Board's finding that the second proposal to remove was issued by Jones "[a]fter learning of the claimant's actions towards Ms. Gartelman" (App. 41) has no basis in the evidence of record.

INTERVENTION WHEN A REVIEWING COURT ENGAGES IN DE NOVO EVIDENTIARY REVIEW

With comparability to the Court of Special Appeals of Maryland, the Court in *Universal Camera Corp., supra*, at 490-491, stated with regard to a case where the substantial evidence standard of review applies, that it would intervene in the rare instance when the standard appears to have been grossly misapplied:

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. *This Court will intervene* only in what ought to be the *rare instance when the standard appears to have been misapprehended or grossly misapplied.* [Emphasis added.]

This is one of the rare cases where the substantial evidence standard of review has been grossly misapplied by the reviewing court.

CONCLUSION

When reviewing the findings of fact set out by the DLLR Board of Appeals where the Board neither evaluated nor even referred to evidence of record to support its findings, the CSA engaged in a *de novo* evaluation of the evidence of record to hold with respect to each Board finding that the finding was supported by substantial evidence. The CSA thus assumed the role of trier of fact in this case – contrary to the Court's proscription in *Universal Camera Corp., supra*, at 488.

Petitioner respectfully submits that this case is appropriate for review by the Court, and that her petition for rehearing of the Court's denial of the petition for writ of certiorari should be granted so

that the CSA's judgment may be vacated and the case remanded to the CSA for further proceedings in conformity with the Court's prior decisions. *Universal Camera Corp., supra*, at 497.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing petition for rehearing denying petition for writ of certiorari is restricted to the grounds specified in Supreme Court Rule 44, para. 2, and is presented in good faith and not for delay.

HENRY EIGLES
Attorney at Law